



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

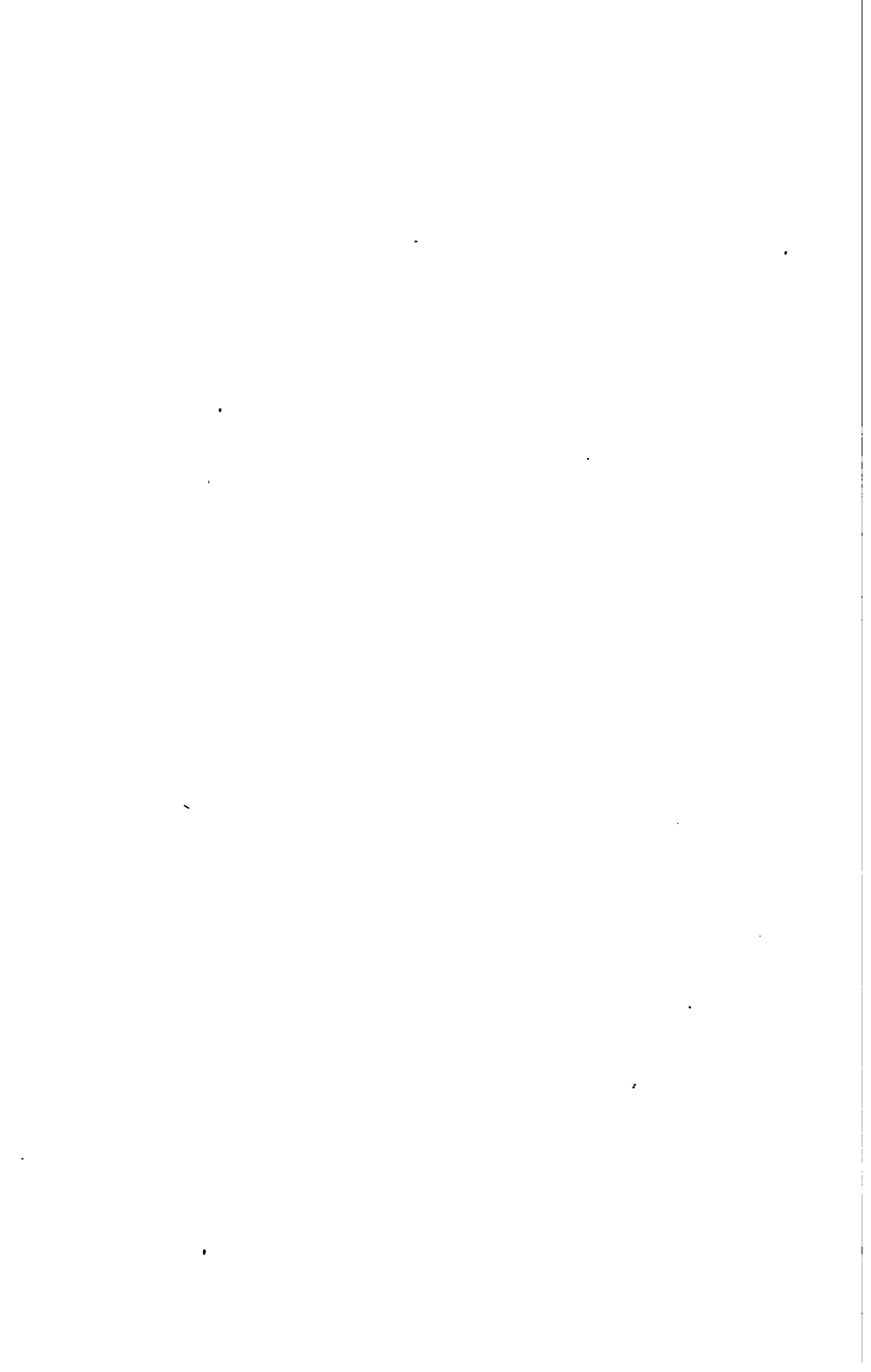


3 2044 078 685 542



HARVARD LAW SCHOOL
LIBRARY

Received *Dec. 11. 1919*



34

137



Apr. 1

137

REPORTS

c

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 288.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL AND
JUNE, 1919, AND CASES WHEREIN REHEARINGS WERE DENIED
AT THE JUNE AND OCTOBER TERMS, 1919.

SAMUEL PASHLEY IRWIN,

REPORTER OF DECISIONS.

BLOOMINGTON, ILL.

1919.

Entered according to Act of Congress, in the year 1919, by
SAMUEL PASHLEY IRWIN,
In the Office of the Librarian of Congress, at Washington.

1919

Pantagraph Printing and Stationery Co.
Printers, Stereotypers, Binders,
Bloomington, Ill.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

WARREN W. DUNCAN, CHIEF JUSTICE.

FRANK K. DUNN, CHIEF JUSTICE.*

JAMES H. CARTWRIGHT,	}	JUSTICES.
WILLIAM M. FARMER,		
ORRIN N. CARTER,		
FRANK K. DUNN,		
WARREN W. DUNCAN,		
CLYDE E. STONE,		
FLOYD E. THOMPSON,†		

ATTORNEY GENERAL,

EDWARD J. BRUNDAGE.

REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

CLERK,

CHARLES W. VAIL.

*Mr. Justice Dunn became chief justice at the June term, 1919.

†At the judicial election held on April 1, 1919, Floyd E. Thompson was elected for the unexpired term of George A. Cooke, resigned.

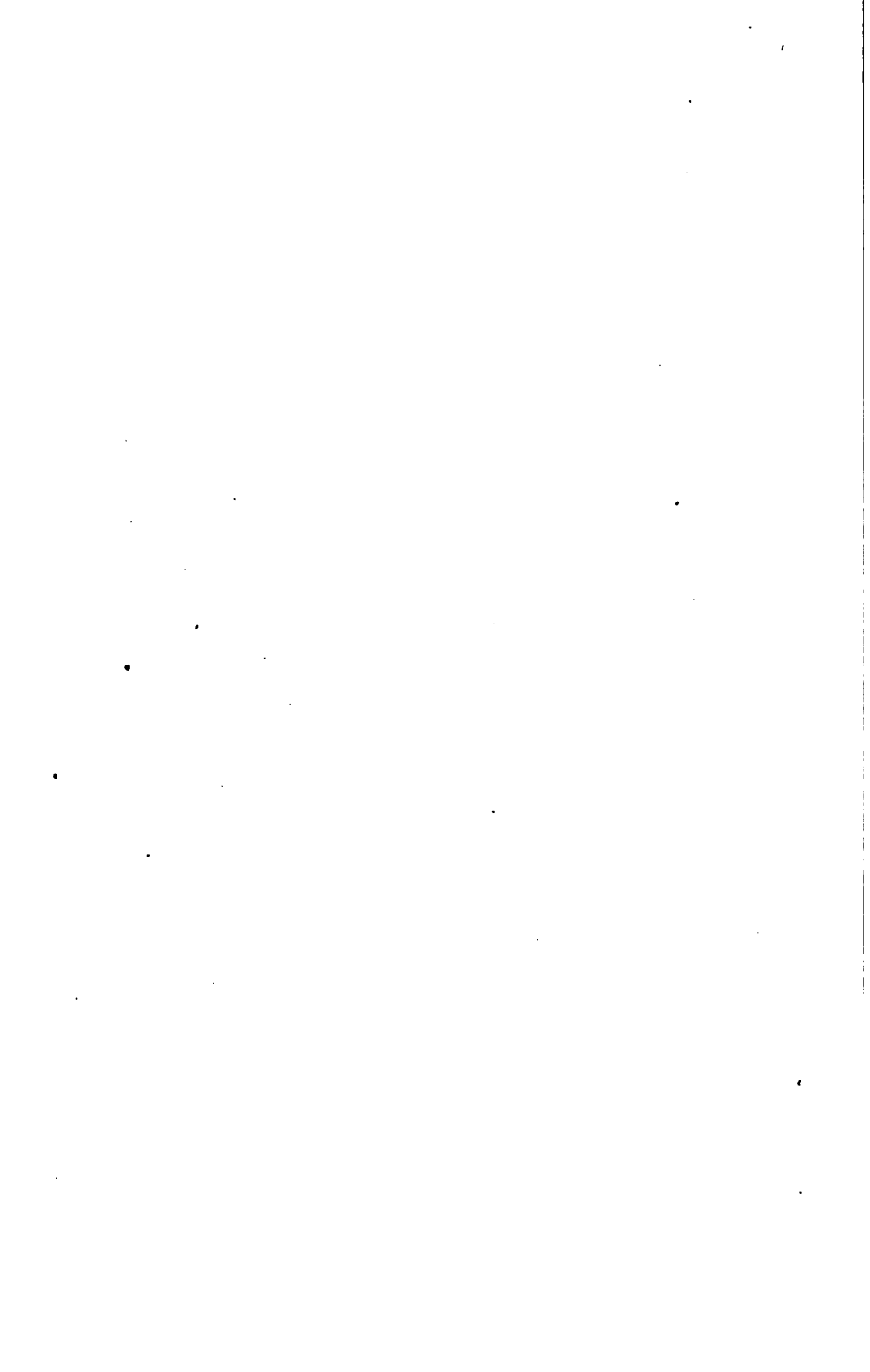


TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.
Abbott <i>v.</i> Church. (Duncan, C. J.).....	91
Allott <i>v.</i> Wilmington Light and Power Co. (Carter, J.).....	541
American Can Co. <i>v.</i> Emmerson. (Stone, J.).....	289

B	
Baker <i>v.</i> Wilmert. (Stone, J.).....	434
Barrett Co. <i>v.</i> Industrial Com. (Dunn, J.).....	39
Baum <i>v.</i> Industrial Com. (Thompson, J.).....	516
Beutel <i>v.</i> Foreman. (Carter, J.).....	106
Board of Education <i>ads.</i> Compton. (Farmer, J.).....	41
Board of Education <i>ads.</i> O'Connor. (Farmer, J.).....	240
Board of Review of Cook Co. <i>ads.</i> Wabash R. R. (Farmer, J.)	159
Brown <i>ads.</i> People. (Farmer, J.).....	489
Bushu <i>ads.</i> People <i>ex rel.</i> (Stone, J.).....	277

C	
Chapin & Gore <i>v.</i> Fehr Construction Co. (Duncan, J.).....	634
Charone <i>ads.</i> People <i>ex rel.</i> (Stone, J.).....	220
Chicago & Alton R. R. <i>v.</i> Industrial Com. (Thompson, J.)...	603
Chicago & Alton R. R. <i>v.</i> Langer. (Dunn, J.).....	16
Chicago City Ry. <i>ads.</i> McFarlane. (Thompson, J.).....	476
Chicago, Rock Isl. & Pac. Ry. <i>v.</i> Industrial Com. (Farmer, J.)	126
Chicago Title and Trust Co. <i>v.</i> Fine Arts Building. (Stone, J.)	142
Church <i>ads.</i> Abbott. (Duncan, C. J.).....	91
Clark <i>ads.</i> Chicago & Alton R. R. (Thompson, J.).....	603
Cleve., C., C. & St. L. Ry. <i>ads.</i> People <i>ex rel.</i> (Duncan, C. J.)	70
Cleve., C., C. & St. L. Ry. <i>ads.</i> People. (Cartwright, J.).....	523

	PAGE.
Cleve., C., C. & St. L. Ry. <i>ads.</i> Utilities Com. (Thompson, J.)	502
Clôyes <i>ads.</i> Spiegel's House Furnishing Co. (Duncan, J.)	422
Compton <i>v.</i> Industrial Com. (Farmer, J.)	41

D

Dare <i>ads.</i> People. (Dunn, J.)	182
Dodd <i>ads.</i> Newark. (Carter, J.)	80
Donovan <i>ads.</i> People <i>ex rel.</i> (Stone, J.)	555
Dunn <i>v.</i> Kearney. (Stone, J.)	49
Dunne <i>v.</i> Rock Island County. (Cartwright, J.)	359

E

Eagleton <i>v.</i> Barrett Co. (Dunn, J.)	39
Eichberg <i>ads.</i> Hammond Co. (Farmer, J.)	262
Eichhorn <i>v.</i> St. Louis and O'Fallon Coal Co. (Cartwright, J.)	351
Eisenberg <i>ads.</i> People <i>ex rel.</i> (Stone, J.)	304
Emmerson <i>ads.</i> American Can Co. (Stone, J.)	289
Evanston High School District <i>ads.</i> O'Connor. (Farmer, J.)	240

F

Farmer <i>v.</i> Fowler. (Carter, J.)	494
Fay <i>ads.</i> Fisher. (Duncan, C. J.)	11
Fehr Construction Co. <i>v.</i> Postl System. (Duncan, J.)	634
Fine Arts Building <i>ads.</i> Chicago Title and Tr. Co. (Stone, J.)	142
Finkl <i>ads.</i> Kellner. (Dunn, C. J.)	451
Fisher <i>v.</i> Fay. (Duncan, C. J.)	11
Follett <i>v.</i> Illinois Central R. R. (Cartwright, J.)	506
Foreman <i>ads.</i> Beutel. (Carter, J.)	106
Foster <i>ads.</i> People. (Carter, J.)	371
Fowler <i>ads.</i> Farmer. (Carter, J.)	494

G

Ginocchio <i>ads.</i> Russo. (Stone, J.)	470
Gits <i>v.</i> Ullrich. (Stone, J.)	527
Goodin <i>ads.</i> Roberts. (Stone, J.)	561

H

Hacken <i>v.</i> Isenberg. (Duncan, J.)	589
Hammond Co. <i>v.</i> Industrial Com. (Farmer, J.)	262
Harrold <i>ads.</i> Wilson. (Carter, J.)	388

PAGE.

Heinrich <i>v.</i> Harrigan. (Duncan, C. J.).....	170
Heinze <i>v.</i> Industrial Com. (Duncan, J.).....	342
Hesterman <i>ads.</i> Weskalties. (Farmer, J.).....	199
Hinck <i>ads.</i> Randolph. (Carter, J.).....	99
Hudelson <i>ads.</i> Hutson. (Dunn, C. J.).....	454
Hutson <i>v.</i> Hudelson. (Dunn, C. J.).....	454

I

Illinois Central R. R. <i>ads.</i> Follett. (Cartwright, J.).....	506
Illinois Clay Products Co. <i>ads.</i> Moll. (Farmer, J.).....	347
Illinois North. Util. Co. <i>ads.</i> Schiller Piano Co. (Farmer, J.)..	580
Insurance Exchange Building <i>ads.</i> People <i>ex rel.</i> (Stone, J.)..	486
Isenberg <i>ads.</i> Rollberg. (Duncan, J.).....	589

J

Jacobs <i>ads.</i> McCartney. (Farmer, J.).....	568
Jakub <i>v.</i> Industrial Com. (Cartwright, J.).....	87
Johnson <i>ads.</i> People. (Thompson, J.).....	442

K

Kanè <i>ads.</i> People, for use, etc. (Cartwright, J.).....	235
Kane <i>v.</i> Weis. (Carter, J.).....	419
Karczewski <i>ads.</i> Wisconsin Steel Co. (Farmer, J.).....	206
Karpovich <i>ads.</i> People. (Stone, J.).....	268
Kearney <i>ads.</i> Dunn. (Stone, J.).....	49
Kellner <i>v.</i> Finkl. (Dunn, C. J.).....	451
Kraujalis <i>ads.</i> Chicago, Rock Island & Pac. Ry. (Farmer, J.)..	126
Krings <i>ads.</i> Heinze. (Duncan, J.).....	342
Kruse <i>ads.</i> Novak. (Stone, J.).....	363
Kucinski <i>ads.</i> Swift & Co. (Stone, J.).....	132

L

Langer <i>ads.</i> Chicago & Alton R. R. (Dunn, J.).....	16
Leavens <i>ads.</i> People <i>ex rel.</i> (Stone, J.).....	447
Leinweber <i>ads.</i> Pohlman. (Farmer, J.).....	58
Lewark <i>v.</i> Dodd. (Carter, J.).....	80
Lowden <i>ads.</i> Mitchell. (Dunn, C. J.).....	327
Luecke <i>ads.</i> Seggebruch. (Stone, J.).....	163

M	PAGE.
Madison County <i>ads.</i> Pauly. (Cartwright, J.).....	255
Martin <i>ads.</i> People <i>ex rel.</i> (Stone, J.).....	615
McCartney <i>v.</i> Jacobs. (Farmer, J.).....	568
McCune <i>v.</i> Reynolds. (Stone, J.).....	188
McFarlane <i>v.</i> Chicago City Ry. (Thompson, J.).....	476
McReynolds <i>v.</i> Stoats. (Stone, J.).....	22
Meins <i>v.</i> Meins. (Stone, J.).....	463
Miedema <i>v.</i> Wormhoudt. (Dunn, C. J.).....	537
Mitchell <i>v.</i> Lowden. (Dunn, C. J.).....	327
Moll <i>v.</i> Industrial Com. (Farmer, J.).....	347
Moses <i>ads.</i> People. (Cartwright, J.).....	281

N

Northern Trust Co. <i>ads.</i> Skinner. (Stone, J.).....	229
Novak <i>v.</i> Kruse. (Stone, J.).....	363

O

O'Connor <i>v.</i> Evanston High School District. (Farmer, J.)...	240
Ogren <i>v.</i> Rockford Star Printing Co. (Duncan, J.).....	405
Otis Elevator Co. <i>v.</i> Industrial Com. (Stone, J.).....	396

P

Paisley <i>ads.</i> People. (Duncan, J.).....	310
Paul <i>v.</i> Industrial Com. (Stone, J.).....	532
Pauly <i>v.</i> Madison County. (Cartwright, J.).....	255
People, for use, etc. <i>v.</i> Kane. (Cartwright, J.).....	235
People <i>v.</i> Brown. (Farmer, J.).....	489
People <i>ex rel.</i> <i>v.</i> Bushu. (Stone, J.).....	277
People <i>ex rel.</i> <i>v.</i> C., C., C. & St. L. Ry. (Duncan, C. J.)....	70
People <i>v.</i> C., C., C. & St. L. Ry. (Cartwright, J.).....	523
People <i>ex rel.</i> <i>v.</i> Charone. (Stone, J.).....	220
People <i>v.</i> Dare. (Dunn, J.).....	182
People <i>ex rel.</i> <i>v.</i> Donovan. (Stone, J.).....	555
People <i>ex rel.</i> <i>v.</i> Eisenberg. (Stone, J.).....	304
People <i>v.</i> Foster. (Carter, J.).....	371
People <i>ex rel.</i> <i>v.</i> Harrigan. (Duncan, C. J.).....	170
People <i>ex rel.</i> <i>v.</i> Insurance Exchange Building. (Stone, J.)..	486
People <i>v.</i> Johnson. (Thompson, J.).....	442

PAGE.

People <i>v.</i> Karpovich. (Stone, J.).....	268
People <i>ex rel. v.</i> Leavens. (Stone, J.).....	447
People <i>ex rel. v.</i> Martin. (Stone, J.).....	615
People <i>v.</i> Moses. (Cartwright, J.).....	281
People <i>v.</i> Paisley. (Duncan, J.).....	310
People <i>v.</i> Schoop. (Duncan, C. J.).....	44
People <i>v.</i> Singer. (Carter, J.).....	113
People <i>v.</i> Sperling. (Carter, J.).....	574
Poehlman <i>v.</i> Leinweber. (Farmer, J.).....	58

R

Randolph <i>v.</i> Hinck. (Carter, J.).....	99
Reynolds <i>ads.</i> McCune. (Stone, J.).....	188
Rienzi Garage <i>ads.</i> Thurber Art Galleries. (Dunn, J.).....	35
Roberts <i>v.</i> Goodin. (Stone, J.).....	561
Rockford and Interurban Ry. <i>ads.</i> Sheldon. (Farmer, J.)....	576
Rockford Star Printing Co. <i>ads.</i> Ogren. (Duncan, J.).....	405
Rock Island County <i>ads.</i> Dunne. (Cartwright, J.).....	359
Rollberg <i>v.</i> Isenberg. (Duncan, J.).....	589
Rubin <i>v.</i> Strandberg. (Farmer, J.).....	64
Russo <i>v.</i> Ginocchio. (Stone, J.).....	470

S

Sandrovitz & Co. <i>ads.</i> Jakub. (Cartwright, J.).....	87
Schiller Piano Co. <i>v.</i> Illinois North. Util. Co. (Farmer, J.)..	580
Schoop <i>ads.</i> People. (Duncan, C. J.).....	44
Seggebruch <i>v.</i> Industrial Com. (Stone, J.).....	163
Sheldon <i>v.</i> Rockford and Interurban Ry. (Farmer, J.).....	576
Simpson <i>ads.</i> Paul. (Stone, J.).....	532
Singer <i>ads.</i> People. (Carter, J.).....	113
Skinner <i>v.</i> Northern Trust Co. (Stone, J.).....	229
Sperling <i>ads.</i> People. (Carter, J.).....	574
Spiegel's House Furnishing Co. <i>v.</i> Indus. Com. (Duncan, J.)..	422
State Pub. Util. Com. <i>v.</i> C., C., C. & St. L. Ry. (Thompson, J.)	502
St. Louis & O'Fallon Coal Co. <i>ads.</i> Eichhorn. (Cartwright, J.)	351
Stoats <i>ads.</i> McReynolds. (Stone, J.).....	22
Strandberg <i>ads.</i> Rubin. (Farmer, J.).....	64
Swift & Co. <i>v.</i> Industrial Com. (Stone, J.).....	132

T

PAGE.

Taylor <i>ads.</i> Village of Winnetka. (Stone, J.).....	624
Thurber Art Galleries <i>v.</i> Rienzi Garage. (Dunn, J.).....	35
Tomczyk <i>ads.</i> Baum. (Thompson, J.).....	516

U

Ullrich <i>ads.</i> Gits. (Stone, J.).....	527
--	-----

W

Wabash R. R. <i>v.</i> Board of Review of Cook County. (Farmer, J.)	159
Wayner <i>ads.</i> Otis Elevator Co. (Stone, J.).....	396
Weis <i>ads.</i> Kane. (Carter, J.).....	419
Weskalnies <i>v.</i> Hesterman. (Farmer, J.).....	199
Wilmert <i>ads.</i> Baker. (Stone, J.).....	434
Wilmington Light and Power Co. <i>ads.</i> Allott. (Carter, J.)...	541
Wilson <i>v.</i> Harrold. (Carter, J.).....	388
Winnetka, Village of, <i>v.</i> Taylor. (Stone, J.).....	624
Wisconsin Steel Co. <i>v.</i> Industrial Com. (Farmer, J.).....	206
Wise <i>v.</i> Wouters. (Farmer, J.).....	29
Wormhoudt <i>ads.</i> Miedema. (Dunn, C. J.).....	537
Wouters <i>ads.</i> Wise. (Farmer, J.).....	29

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

(No. 12424.—Judgment affirmed.)

**JAMES FISHER *et al.* Appellants, *vs.* HARVEY FAY, County
Clerk, *et al.* Appellees.**

Opinion filed April 15, 1919.

1. **SCHOOLS**—*there is no constitutional limitation as to agencies the State shall adopt in providing free schools.* There is no constitutional limitation as to the agencies the legislature shall adopt in providing for free schools or as to the tax rates that shall be fixed for such purpose, and the legislature may form and constitute any territory it may see fit into a school district and give to it corporate powers as such without any vote or consent of the people of the territory.

2. **SAME**—*the validating act of 1917 is valid.* The high school validating act of 1917 is valid, as it only purports to validate such proceedings with reference to the organization of districts as the legislature might have authorized in the first instance.

3. **SAME**—*validating act of 1917 makes valid all acts of boards of education authorized by general School law.* The high school validating act of 1917 makes valid every act of the boards of education of the districts affected where such acts were authorized by the general School law, including the levy of high school taxes previously levied in a district coming within the act.

APPEAL from the Circuit Court of Piatt county; the
Hon. GEORGE A. SENTEL, Judge, presiding.

HERRICK & HERRICK, for appellants.

GEORGE M. THOMPSON, CHARLES C. LEFORGEE, GEORGE W. BLACK, and THOMAS W. SAMUELS, for appellees.

Mr. CHIEF JUSTICE DUNCAN delivered the opinion of the court:

Appellants, as land owners and tax-payers of Bement Township High School District No. 108, filed a bill in the circuit court of Piatt county March 6, 1917, to enjoin a tax of \$10,000 levied by the president and board of education of said district July 22, 1916, for educational and building purposes. The county clerk of said county, the tax collectors of the several towns of said school district and the board of education thereof were made parties defendant and a preliminary injunction was issued. Defendants answered the bill and moved to dissolve the injunction, supported by affidavits. Appellants also filed affidavits and introduced evidence in support of their bill. On final hearing, June 10, 1918, the court dissolved the injunction, dismissed the bill for want of equity at appellants' costs, and they prayed and have perfected this appeal.

The evidence discloses that on September 18, 1915, a petition was filed with the county superintendent of schools of said county in the usual form and signed by more than fifty of the legal voters of said territory, praying that he submit, at an election to be held for that purpose, the proposition to organize the territory therein named, containing about eighty-four sections of contiguous and compact territory in said county, into a high school district. An election was regularly called, advertised and held October 9, 1915, in said territory, and at the election there were cast 353 votes for the organization of said township high school and 232 against such organization. The vote was declared and published and the district was duly organized

in accordance with the provisions of the High School act of June 5, 1911, under the name aforesaid. An election for a board of education, consisting of a president and six members, was then duly called, advertised and held November 6, 1915, under said act, and a president and six members were then duly elected as the board of education for the district. Thereafter, on proper petitions and elections, school district No. 77 in said county, having a territory of two sections, was duly annexed to said high school district, and the county superintendent of schools filed with the county clerk of said county on April 3, 1916, his certificate of annexation, and directed him to add the two sections composing district 77 to high school district No. 108. On June 1, 1916, appellants presented a petition for *certiorari* to the circuit judge of said county against the county superintendent of schools and the president and members of the board of education of said high school district No. 108, in substance charging that the alleged organization of the said district was void and the statute of June 5, 1911, under which it was organized, unconstitutional. Leave was granted, and upon the return made and a hearing the circuit court quashed the writ and dismissed the petition. On appeal to this court the judgment of the circuit court was on February 21, 1917, reversed and the cause remanded. (*Fisher v. McIntosh*, 277 Ill. 432.) It further appears that after the cause was remanded by this court and re-instated in the circuit court, and after the validating act of June 14, 1917, was passed and became a law, the writ of *certiorari* was again quashed and the petition dismissed. Teachers were employed and a high school has been conducted in rented premises in said district No. 108 up to the filing of this bill, since the fall of 1916. The board of education authorized an issue of bonds in the amount of \$55,000 for the purpose of constructing a high school building in said district pursuant to a vote of the people, and the bonds were sold prior to the filing of this bill but were not deliv-

ered. About one-half of the \$10,000 tax levied and sought to be enjoined by this bill has been collected from the taxpayers but the other half is still unpaid.

The bill set up the foregoing facts and the ultimate facts from which the foregoing conclusions are drawn in detail, and other facts, and is in proper form. It was charged in the bill that the act under which said district was sought to be organized is unconstitutional and void. This court has so held in *People v. Weis*, 275 Ill. 581. The bill further charged that the validating act of June 14, 1917, is unconstitutional and void, as contravening section 2 of article 2 and sections 9 and 10 of article 9 of the constitution of Illinois and the fifth and fourteenth amendments to the constitution of the United States, and that for those reasons said act had no legal effect to validate said district or the election of the board of education or any of the official acts of such board.

The validating act approved June 14, 1917, purports to validate all elections for the organization of high school districts, and all such high school districts and all boards of education, and all their official acts done, had or performed, when such acts are such as are authorized to be done, had or performed by the general School law of this State, in all cases where a majority of the inhabitants of any contiguous and compact territory voting on the proposition have voted, at any election called for the purpose by a county superintendent of schools, in favor of the organization of such territory into a high school district, and when, at a subsequent election similarly called and held, a board of education has been chosen for such district. There is no constitutional limit placed upon the rights and powers of the legislature to fix such rates of taxation for school purposes in this State as it may see fit, nor is there any constitutional limitation placed on the legislature with reference to the formation of school districts or as to the agencies the State shall adopt for providing for free schools.

(*People v. Chicago and Illinois Midland Railway Co.* 256 Ill. 488; *Speight v. People*, 87 id. 595.) Section 1 of article 8 of the constitution expressly provides that "the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." There is not a suggestion anywhere in the constitution that the legislature cannot, by enactment, form and constitute any territory it may see fit into a school district and give to it corporate powers as such, without any vote or consent of the people of that territory. Inasmuch as the legislature may do this or authorize the organization of high school districts out of compact and contiguous territory without requiring a petition or vote of the people on the question, this court has frequently held said validating act valid under the familiar principle that the legislature may validate by a curative act any proceeding which it might have authorized in advance. (*People v. Madison*, 280 Ill. 96; *People v. Fifer*, id. 506; *People v. Stitt*, id. 553; *People v. Woodruff*, id. 472.) We have also held that said act had the effect to make valid every act of such a board of education which under the general School law boards of education are empowered to do and perform, including high school taxes previously levied in such district coming within the provisions of the act. (*People v. Mathews*, 282 Ill. 85; *People v. New York Central Railroad Co.* id. 11; *People v. Pittsburg, Cincinnati, Chicago and St. Louis Railroad Co.* 284 id. 87; *People v. New York Central Railroad Co.* 282 id. 458.) It was expressly held in said cases, and particularly in *People v. Pittsburg, Cincinnati, Chicago and St. Louis Railroad Co. supra*, that said act neither violates sections 9 and 10 of article 9 nor section 2 of article 2 of the constitution. If the validating act is valid under our constitution, there is no more reason for saying that the said act contravenes the fifth and fourteenth amendments of the constitution of the United States than there is for saying that any other

high school act in this State contravenes them, so far as we are able to see. No pertinent reason has been suggested by counsel why the act violates the constitution of the United States, and we therefore re-affirm the validity of the act.

It is suggested by counsel that this case is different from any other that has arisen under said act because of the fact that it has been constantly and persistently fought by appellants from the very organization of the district. This case does not possess that rare distinction, as will be observed by a reading of the cases already cited herein as well as many other cases that have been decided by this court under said act. The case was properly decided by the lower court according to the law as it existed when the judgment was rendered.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12582.—Judgment affirmed.)

THE CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff
in Error, vs. JOHN LANGER, Defendant in Error.

Opinion filed April 15, 1919.

1. DEEDS—*when grantor is estopped to allege that uncertainty of description has rendered deed void.* Where premises are so described in a deed that they cannot be identified the conveyance is void, but where the grantee, with the consent of the grantor, is permitted to take possession of premises within the general terms of the description in the deed and occupy them and make permanent improvements thereon, the grantor is estopped to urge the uncertainty of description as ground for avoiding the entire conveyance.

2. SAME—*when rule does not apply that occupant claiming under color of title is not limited to premises actually possessed.* The rule that where one enters upon real estate under color of title his possession is not limited to the portion of the premises which he actually occupies but extends to all the lands included in the instrument under which he claims, does not apply where the instrument

under which the occupant claims contains no description of the property conveyed with sufficient certainty to identify any land.

3. SAME—*what is included in indefinite grant of right of way.* Where the description in a quit-claim deed to a railroad company of a right of way 100 feet wide is so uncertain that it does not identify any land, the construction of the track with the consent of the grantor will establish the line of railroad, but the right of way will include only the space occupied by the rails, ties, switches, side-tracks, ditches, cuts, embankments and other constructions, together with such means of ingress and egress on both sides as are reasonably necessary for the operation and maintenance of the railroad in a customary way. (*Chidester v. Springfield and Illinois Southeastern Railway Co.* 59 Ill. 87, explained.)

4. SAME—*conveyance of a certain number of acres out of a larger tract is too indefinite to convey title.* The conveyance of a certain number of acres out of a larger tract of land does not designate any tract of land that can be located and conveys no title.

WRIT OF ERROR to the Circuit Court of Greene county;
the Hon. FRANK W. BURTON, Judge, presiding.

T. I. McKNIGHT, and CHAPMAN & DUHADWAY, (SILAS H. STRAWN, of counsel,) for plaintiff in error.

F. A. WHITESIDE, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Chicago and Alton Railroad Company brought an action of ejectment in the circuit court of Greene county against John Langer to recover the possession of a parcel of land 19 feet wide north and south and 67.8 feet long east and west, lying on the north side of the plaintiff's railroad. The cause was tried by a jury, and at the close of the evidence the court instructed the jury to find the issues for the defendant and entered judgment against the plaintiff, which has sued out a writ of error.

Several questions have been argued, but the only one necessary to be decided is whether the plaintiff in error showed any title to the land. The land in question is a part of the northwest quarter of section 28, in town 10,

range 13, in Greene county. On October 12, 1883, William B. Farrow owned this quarter section except a strip off the east side of it, and on that day he executed a quit-claim deed conveying to the Litchfield, Carrollton and Western Railroad Company "a right of way of 100 feet in width for so much of said railroad as may pass over or through the following described real estate: Near the southeast corner of the northwest quarter of section 28, thence due west three-fourths of a mile, thence to the northwest corner of section 29, suitable ground for depot of two acres, * * * situate in the county of Greene and State of Illinois." Afterward, in the same year, the grantee built its railroad across the northwest quarter of section 28 and the track has ever since been where it now is. The property of the Litchfield, Carrollton and Western Railroad Company was afterward acquired by the plaintiff in error. Farrow continued to own the adjoining land in the northwest quarter of section 28 until his death, in 1891, and his interest in the quarter section was sold by his administratrix, under an order of the county court, to his son, Del-lis Farrow, through whom the defendant in error derives his title.

The description in William B. Farrow's deed to the railroad company did not describe any specific tract of land. There were no words indicating on what part of the quarter section the right of way was to be located, except that it was to begin near the southeast corner and run due west three-fourths of a mile. This would locate it near the south side of the quarter section, but the description was still so indefinite that the precise boundaries cannot be located.

In *Illinois Central Railroad Co. v. O'Connor*, 154 Ill. 550, the owner of a tract of land in a certain quarter section conveyed to the railroad company "the right of way over and through said tract, said right of way to comprise land of the width of 200 feet." The railroad company

soon after enclosed with a fence 50 feet on either side of its main track. Some years later the railroad company took down the west fence and erected a new one 50 feet further from the track. Afterward the grantee of the original owner brought an ejectment suit against the railroad company for the 50-foot strip thus taken possession of by the railroad company, which claimed an easement in it for the right of way for its railroad. The court said: "The first question suggested upon a consideration of the facts agreed upon by the parties is, has the defendant shown any • title whatever to such an easement over this land? Its deed from Harbord did not, by its description, state out of what part of the tract the 200 feet for right of way should be taken, nor did it convey, as is sometimes done, a certain number of feet on either side of the center of the track. Therefore, until the grantee, by some act on its part other than the mere location of its track, designated the land claimed by it under the deed, no easement was acquired over any particular land. But when the company came to assert its rights under its deed it took no possession of this piece of land, nor, so far as the agreed facts show, did it in any way indicate that it claimed an easement over it. The deed itself did not specifically convey this 50 feet, nor did the grantee, in exercising its rights under it, assert any title whatever thereto, but, on the contrary, in taking possession under its deed excluded it,—fenced it out of its right of way. There is nothing in the facts of the case tending to show that it by act or declaration construed its deed to include this land for more than thirty years after its date and taking possession under it."

When the plaintiff in error, with the consent of William B. Farrow, its grantor, constructed its track through the quarter section, the objection of uncertainty was removed by the action of the parties to the extent that actual possession was taken under the deed but only to the extent of such actual possession. Where the premises in a deed

are so described that they cannot be identified the conveyance is void. Where the grantee, by the consent of the grantor, is permitted to take possession of premises within the general terms of the description and occupy and make permanent improvements upon them, the grantor will be estopped to urge the uncertainty of the description, and a court of equity will compel the execution of a deed properly describing the lands intended. (*Purinton v. Northern Illinois Railroad Co.* 46 Ill. 297.) The plaintiff in error can not claim to have taken possession of any part of the premises which it did not actually occupy. Where one enters upon real estate under color of title his possession is not regarded as limited to the portion of the premises which he actually occupies but extends to all the lands included in the instrument under which he claims. The plaintiff in error, however, can derive no benefit from this rule, because the instrument under which it claims includes no lands, for the reason that it does not definitely describe any property. The location of the 100 feet in width was not given with sufficient certainty to identify any land.

There is no evidence tending to show that the plaintiff in error ever took actual possession of the land in controversy. It was never enclosed in the right of way by a fence, it was never used by the railroad company in any way, and its nearest point was over 30 feet from the center of the railroad track. While the evidence shows that the railroad company was permitted to construct its track over the quarter section, there are no circumstances which tend to show that the location of the right of way was more definitely agreed upon than it is described in the deed. The construction of the track established the line, and the right of way 100 feet wide must be held to include the space occupied by the rails, ties, switches, side-tracks, ditches, cuts, embankments and other construction, together with such means of ingress and egress on both sides as are reasonably necessary for the operation and maintenance of the

railroad in the customary way. This much the grantor assented to when he permitted the railroad company to take possession, under its deed, of the space so occupied. The description of the right of way was not thereby extended to include land not taken possession of and not described.

The plaintiff in error contends that when a deed conveys to a railroad company a strip of land through a certain tract for a right of way without definitely describing the location the company has a right to choose the exact location. If this be so, the evidence shows only that the railroad company located the line of the right of way and not its outside boundaries. In answer to this, counsel insist that where the right of way is described as of a certain width and not otherwise located it is presumed to extend an equal distance on either side of the center line of its tracks, and *Chidester v. Springfield and Illinois South-eastern Railway Co.* 59 Ill. 87, is cited in support of this contention. In that case no question of a right of way arose but the contention was in regard to a tract of land which the owner had executed a bond to convey to the railroad company. The owner covenanted by the bond to convey to the railroad company, in consideration of the construction of its road, depot and station house in a certain locality, the right of way through a certain tract of land, "and also seven acres of land in said section, tract and orchard adjoining to said right of way on either side thereof." The court was of the opinion that the bond should be construed as requiring a conveyance of the right of way wherever the company might choose to establish its track, and that the seven acres "adjoining to said right of way on either side thereof" meant three and one-half acres on each side of the right of way, being a strip of land of uniform width extending along the railway through the entire tract. The conveyance of a certain number of acres out of a larger tract is wholly insufficient to designate any tract of land that can be located, and such a description is

so defective that no title whatever will pass by it. (*Hughes v. Streeter*, 24 Ill. 648.) The description "adjoining the right of way" on either, each or both sides does not help it. A grant of a certain quantity of land to be taken out of a larger tract, with no other description than that it should lie on both sides of a highway, was held void for uncertainty in *Smith v. Proctor*, 139 N. C. 314. The material part of the description in *Illinois Central Railroad Co. v. O'Connor*, *supra*, was substantially the same as that in Farrow's deed of the right of way here, and it was held that it was insufficient to convey the title.

The evidence fails to show that the railroad company acquired any title to the premises in question, and the instruction to find the issues for the defendant was therefore properly given.

The judgment will be affirmed. *Judgment affirmed.*

(No. 12114.—Decree affirmed.)

THOMAS J. MCREYNOLDS, Appellee, vs. PETER C. STOATS
et al. Appellants.

Opinion filed April 15, 1919.

1. DEEDS—*recording of deed creates presumption of delivery—minors.* Where a deed is recorded there is a presumption of delivery, and where the grantor is the father of the grantee, who is a minor, knowledge of the conveyance and its acceptance by the grantee is not necessary; and the presumption of delivery is not overcome by the fact that the grantor retained possession of the property and the deed.

2. SAME—*when court is justified in finding that scrivener omitted description of tract by mistake.* Where a warranty deed recites that the land described contains 280 acres, which was all the land owned by the grantor, but the description covers only 240 acres of the grantor's land, the court may find that the scrivener omitted to describe one 40-acre tract, where the evidence also shows that the grantee took possession of the entire 280 acres, mortgaged and

subsequently conveyed the same by proper description, and that his grantor never made any claim of title to the omitted 40 acres.

3. *SAME—intention of parties apparent in deed controls in construction.* The intention of the parties apparent and manifest from the instrument, when each clause is given its legal effect, controls the court in the construction of a deed.

4. *MORTGAGES—presumption of existence of a mortgage from certificate of notary not overcome except by clear proof.* The presumption of the existence of a mortgage arising from the certificate of the notary is not to be overcome except by clear proof, although the mortgagor testifies that he does not remember executing the mortgage.

5. *SAME—what is proof of intention to release mortgage.* The fact that a release is written on the margin of the record of a mortgage and is signed by the mortgagee is in itself proof of the intention to release the mortgage although the expression to "quit-claim" the premises is used.

6. *SAME—equity will look to substance of transaction.* A court of equity will look beyond the mere form and into the substance of the transaction and give effect to the true intent and meaning of the parties.

APPEAL from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

L. T. GRAHAM, and HAINER, CRAFT & EDGERTON, for appellants.

W. E. WILLIAMS, and A. CLAY WILLIAMS, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Pike county quieting title to certain land in appellee, complainant in that court.

The land in question is an 80-acre tract described as the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section 14, township 4, north, range 5, west of the fourth principal meridian, in Pike county, and was entered by Peter C. Stoats, whose name is sometimes spelled Staats, who died intestate in

1863. On August 16, 1864, for a valuable consideration, Hannah Stoats, widow of Peter C. Stoats, deceased, quit-claimed her interest in the premises in question, and other land, to Alice M. Patton, (*nee* Stoats,) only heir-at-law of Peter C. Stoats and wife of David H. Patton. The appellants are sons and grandchildren, respectively, of Alice M. Patton. It appears in evidence that on November 7, 1887, David H. Patton and Alice M. Patton, his wife, in consideration of \$7200, executed a warranty deed to all of the land in question to Charles H. Patton, their minor son, who on the same day executed a mortgage for \$7200 to secure a note payable to David H. Patton. On November 30 following, Charles H. Patton and his wife executed a deed to David H. Patton, which he subsequently recorded, for all the premises in question. On December 10 following, David H. Patton entered on the margin of the record of the above mortgage what appellee claims was a release thereof. David H. Patton and his wife during all of this time, and up to the time of her death, occupied the premises as a homestead, and at no time did Charles H. Patton possess or exercise ownership over said land other than by said conveyances. Alice M. Patton died in 1889 and her husband thereafter re-married on June 27, 1901. He and his second wife, Jennie, by their warranty deed conveyed the land in question to Frank E. Huse. In this conveyance 40 acres of the land in question were omitted from the description. The deed, however, purported to convey 280 acres of land then in the possession of the grantors instead of 240 acres, as shown by the description. In January, 1903, Huse and wife conveyed by proper description said 280 acres, including by description the 40 acres omitted from the deed of David H. Patton. The appellee is in possession, through *mesne* conveyances from Huse, of the 80 acres of land in question. The entire 80 acres of land is described in each of the *mesne* conveyances from Huse to the appellee.

It is contended by the appellee that the necessary evidence can be supplied from the deed itself referring to the fact that 280 acres of land is intended to be conveyed, the surrender of possession by David H. Patton to Frank E. Huse, and the *mesne* conveyances, with possession under claim of ownership, payment of taxes and the making of improvements. It is contended by the appellants that the deed to Charles H. Patton by his father and mother on November 7, 1887, was not delivered to him nor accepted by him; that he had no knowledge that the same was made and that it was placed on record without his knowledge or consent, and that therefore, no title or interest in the premises passed to him by said conveyance; that there is no evidence to sustain the holding in the trial court that a mistake was made by the scrivener in omitting the 40 acres of land from the deed of David H. Patton and his second wife to Frank E. Huse.

The first question arising on this record is, was the deed from David H. and Alice M. Patton delivered to Charles H. Patton, their minor son, so as to invest him with the title to the premises? It appears that the grantor and his wife executed the deed and that the grantor had the same recorded and thereafter retained the deed. The son testified that he did not know the deed was made until the date of the re-conveyance by him and his wife to his father. In *Hayes v. Boylan*, 141 Ill. 400, the rule is held to be, that where the grantee is an infant the presumption of acceptance is a rule of law, and knowledge of the conveyance and of its acceptance is not necessary; but "this is because the infant is incapable of doing any act in regard to the deed which he might not avoid on reaching his majority, and it is the duty of the parent, as his natural guardian, to accept and preserve the deed for him." (*Masterson v. Cheek*, 23 Ill. 72.) Where a deed is recorded there is a presumption of delivery, and this presumption is not overcome by the fact that the grantor, who stood in a fiduciary relation

to the grantee, retained possession of the property and the deed. (*Baker v. Hall*, 214 Ill. 364; *Creighton v. Roe*, 218 id. 619; *Decker v. Stansberry*, 249 id. 487.) The presumption of delivery and knowledge of the making of the deed is further strengthened by the evidence of the making of a mortgage by Charles H. Patton and wife to said premises on the same date as that of the execution of the deed to him. Charles H. Patton testifies that he does not remember executing said mortgage. The presumption arising from the certificate of the notary, however, is not to be overcome except by clear proof. It was held in the early case of *Lickmon v. Harding*, 65 Ill. 505, that in the absence of proof of fraud and collusion on the part of the officer taking and certifying a deed, the officer's certificate in proper form must prevail over the unsupported testimony of the grantor that the same was false and forged. (*Fitzgerald v. Fitzgerald*, 100 Ill. 385.) We are of the opinion that the chancellor was justified in finding that Charles H. Patton and his wife executed the mortgage in question. It is not denied that they executed the deed of reconveyance to his father on November 30, 1887. By said deed, therefore, the fee to the premises was vested in David H. Patton, subject to the repudiation of the deed by Charles H. Patton upon his arriving at his majority. This privilege appears not to have been exercised by him.

On December 10, 1887, David H. Patton executed a release on the margin of the record of the mortgage given by Charles H. Patton. The release is in the following words:

"For and in consideration of the full payment to me of the amount secured by the annexed mortgage, I hereby release and quit-claim to Charles H. Patton, by whom said payment was made, the premises included in said mortgage and forever release and discharge the same of record.

"Dated the 10th day of December, A. D. 1887.

DAVID H. PATTON."

It is evident from the release itself that the intention of David H. Patton was to release the mortgage and not

to execute a quit-claim deed to the premises. The fact that it appears on the margin of the mortgage record is in itself proof of that intention. Furthermore, this release is not acknowledged and does not contain the formal requisites of a quit-claim deed. The fact that the word "quit-claim" is used is by no means controlling. A court of equity will look beyond the mere form and into the substance of the transaction and give effect to the true intent and meaning of the parties in such transaction. *Sanford v. Kane*, 133 Ill. 199.

It is also contended that the chancellor erred in finding that in the deed from David H. and Jennie Patton, his second wife, to Frank E. Huse, the description of 40 acres, being the northwest quarter of the southeast quarter of said land, was omitted by mistake of the scrivener, and that it was the intention of Patton to include said 40 acres in the deed. The proof shows that David H. Patton, at the time he executed the deed to Huse, owned 280 acres of land, including the 80 acres involved in this suit; that the 40 acres omitted from the deed were a part of said 280 acres; that the 280 acres of land was all the land he owned. The deed describes all of the 280 acres by legal description except said 40 acres, and contains after said description these words: "Containing in all two hundred and eighty (280) acres, more or less." It appears that within four days after the making of this deed the grantee mortgaged this 280-acre tract, including in the description thereof the description of the 40-acre tract, and that all subsequent conveyances of the 280-acre tract contained a like description. It also appears from the evidence that the grantor moved to the State of Oklahoma, where he resided for the balance of his life; that he at no time thereafter sought to use, control or transfer the 40-acre tract, and that appellee and his grantors have had uninterrupted possession of the 40-acre tract since that time. Counsel for appellee also state that the record shows that David H. Patton, at the time he made said deed, intended to dispose of all of his property. This is not de-

nied by counsel for appellants, and as the abstract contains none of the evidence touching this transfer and the transcript of the record is neither paged nor indexed, we are inclined to accept the statement of counsel concerning said grantor's intention. It appears that said grantor and the scrivener who wrote the deed are both dead, and that the grantee, Frank E. Huse, could not be found. It is not necessary to put a witness on the stand to testify that the scrivener omitted the description of the 40-acre tract by mistake when he wrote the deed. Where there is doubt as to the construction of a deed it is to be interpreted most favorably for the grantee. (*Bradish v. Yocum*, 130 Ill. 386; *Kirby v. Wabash, St. Louis and Pacific Railway Co.* 109 id. 412, 2 Washburn on Real Prop.—2d ed.—669.) The intention of the parties apparent and manifest from the instrument, when there is given to each clause its legal effect, controls the court in the construction of a deed. (*Lehndorf v. Cope*, 122 Ill. 317.) It is apparent from this deed and the action of the grantor subsequent thereto, as well as the circumstances of this case as herein noted, that the chancellor was justified in finding that the description of the 40-acre tract was omitted from the deed by the scrivener by mistake.

It is also urged that the title to said land was procured by David H. Patton through a fraud upon his wife, Alice M. Patton. While this could avail appellants nothing now, when the interests of purchasers for value are involved, counsel have not directed the attention of the court to any evidence in the record supporting such claim. It might well have been that the conveyances were made in accordance with her wishes in the matter.

There being no error in the record the decree of the circuit court will be affirmed.

Decree affirmed.

(No. 12588.—Decree affirmed.)

ALMA F. WISE, Appellant, vs. JENNIE H. WOUTERS *et al.*
Appellees.

Opinion filed April 15, 1919.

1. DEEDS—*ambiguous clause will be construed against grantor.* Where a deed is so worded that it will be understood in one way by some and in another way by others, that meaning is to be adopted which is adverse to the interest of the grantor.

2. SAME—*when court will consider surrounding circumstances in construing deed.* Where the terms of a deed are ambiguous, to ascertain the intention of the parties the court will take notice of the surrounding circumstances.

3. SAME—*when a covenant runs with the land.* Where the owner of two adjoining lots conveys one of them, except ten feet thereof, with a covenant that the ten-foot strip shall be kept open as a passageway to be used in connection with a building which the grantor intends to erect on the adjoining lot, the fact that the grantor subsequently abandons the building project and sells the adjoining lot and the ten-foot strip, reciting in the deed the former covenant as to the passageway, will not prevent said covenant from running with the land.

APPEAL from the Circuit Court of Cook county; the
Hon. MERRITT W. PINCKNEY, Judge, presiding.

BROWN, BROWN & BROWN, for appellant.

GEORGE W. BROWN, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Woodlawn Park Lodge No. 825, Independent Order of Odd Fellows, originally owned lots 5 and 6 in Towle & Evoy's subdivision of lots 1, 2, 5 and 6, block 1, second plat of Woodlawn. Said lots fronted on the west side of Woodlawn avenue between Sixty-third and Sixty-fourth streets, and each was fifty feet in width. The lodge appears to have acquired the lots with a view to the erection thereon, or on a part of them, of a lodge hall. On Novem-

ber 11, 1915, the lodge conveyed by warranty deed to Jennie Wouters lot 5, except the south ten feet thereof. The deed contained this provision: "Said first party agrees that it will keep the south ten feet of said lot 5, except the west twenty-five feet thereof, as an open, unobstructed passageway or private alley in connection with a lodge hall hereafter to be constructed, and said passageway or private alley shall be kept and maintained as such, as required by the ordinances of Chicago, for hall and amusement purposes." Subsequently the lodge decided not to build a hall on the property, and sold and conveyed by warranty deed to Alma F. Wise on January 24, 1917, lot 6 and the south ten feet of lot 5. This deed contained the following provision: "The south ten feet of lot 5 is hereby granted, with a covenant running with the land that the said grantee will keep the south ten feet of lot 5, except the west twenty-five feet thereof, as an open, unobstructed passageway or private alley, subject to the conditions relating to said south ten feet of lot 5 contained in the deed from said Woodlawn Park Lodge No. 825, Independent Order of Odd Fellows of Illinois, to Jennie Wouters." After the conveyance to Jennie Wouters by the lodge she took possession of the premises and erected on lot 5 a brick building covering the entire forty feet frontage and extending back about fifty-four feet. Immediately in the rear of said building she erected a garage building of seven individual garages, the garage building being about twenty-one feet wide north and south by seventy-eight feet long east and west. The remainder of said forty feet of lot 5 in front of said garages was improved with a cement pavement and furnished access to the passageway. The improvements were completed November, 1916. The brick building on the front of the lot was in part used by Jennie Wouters and her husband as a laundry-distributing office and part of it by a tailor as a tenant of the owner, and the seven garages were rented to various parties at seven dollars per month each. After

the conveyance to Mrs. Wise she improved the property conveyed to her up to but not upon any part of the south ten feet of lot 5, except the west twenty-five feet thereof. She caused to be paved the east fifty-five feet of the alleyway with brick laid in cement and the remainder of it with cement blocks and cinders. Both Mrs. Wise and Mrs. Wouters used the alleyway for vehicles and otherwise for access to and ingress from the buildings in the rear of their respective premises. There were no other means of access to said buildings from any direction. In December, 1917, Mrs. Wise notified Mrs. Wouters she intended to close up said alleyway and proceeded to place a board fence across it. This was torn down, and Mrs. Wouters notified Mrs. Wise she would tear down any obstruction she placed in said alleyway. Thereupon Mrs. Wise filed a bill to enjoin Mrs. Wouters from interfering with the complainant's free and unrestricted use and occupation of the south ten feet of lot 5. After answer filed the cause was referred to a master in chancery to take the proofs and report his conclusions of law and fact thereon. The master heard the testimony and reported that the defendant to the bill had an easement in the ten-foot strip of land in question without limitation or restriction and not dependent upon the building of a lodge hall by Woodlawn Park Lodge No. 825; that said alley was for the joint use and benefit of Mrs. Wouters, the lodge and those claiming under them. He recommended that the injunction be denied and the bill dismissed. Exceptions to the master's report were overruled by the chancellor and the bill dismissed at complainant's costs. From that decree complainant has prosecuted an appeal to this court.

Appellant contends that the deed to defendant did not create a covenant running with the land; that the obligation to keep the ten-foot alley open was upon condition that the lodge erect a hall and maintain the alley in connection therewith, and it is contended that whatever interest de-

defendant took in the ten-foot strip left for an alleyway was that of a mere licensee, which only attached upon the erection of the lodge hall and the opening of the alley and could be revoked by the grantor at pleasure. We do not think this a proper construction of the effect of the deeds, both of which must be construed together. It is no doubt true that when the deed was made by the lodge to defendant the lodge had in contemplation the erection of a hall on lot 6, and the deed provided that the south ten feet of lot 5, except the west twenty-five feet thereof, should be kept as an open, unobstructed passageway or private alley in connection with a hall thereafter to be built, and which passageway or private alley should be kept and maintained as required by the ordinances of the city. The ordinances require a lodge hall seating 800 persons, to have a frontage upon two public places, one of which shall be a street, and the other, if not a street, shall be a public or private alley, not less than ten feet wide, opening directly on a public street or alley. The references to the alley in connection with a hall to be built and its maintenance as required by the ordinances were words of description and were not a condition of the grant of the easement. That the grant of the easement was without limitation or restriction and not dependent upon building a lodge hall seems clear from the provisions in the deed to complainant. That deed expressly recognized that the conveyance to defendant created a covenant running with the land that the private alleyway should be kept open and unobstructed upon the conditions contained in the deed from the grantor to the defendant. The reference to the conditions in the deed to defendant could not have meant that continuance of the easement depended upon the building of a lodge hall, for the lodge, by the deed to complainant, put it out of its power to build a hall on the premises, and the deed imposed no obligation on the grantee to build a hall for the lodge. We are of opinion that the provision that the alley was to be kept and main-

tained was on its face an unconditional covenant running with the land. But even if the language were ambiguous, the surrounding facts and circumstances make it clear that such was intended by the parties. Complainant's grantor recognized and recited in its deed to her that it had by its deed to defendant created a covenant running with the land to keep the alleyway open. Where a deed is so worded that it will be understood in one way by some and in another way by others, that meaning is to be adopted which is adverse to the interest of the grantor. (*City of Alton v. Illinois Transportation Co.* 12 Ill. 38; *United States Mortgage Co. v. Gross*, 93 id. 483.) Where the meaning is doubtful the doubt will be solved in favor of the grantee. *Kirby v. Wabash, St. Louis and Pacific Railway Co.* 109 Ill. 412.

The appellant concedes that where the terms of a deed are ambiguous, to ascertain the intention of the parties the court will take notice of the surrounding circumstances. Some of the facts in this connection disclosed by the proof are, that the lodge proposed to sell part of lot 5 to raise money to be used in building the contemplated hall, and appointed J. C. Kimball, one of its trustees, who was engaged in the real estate business, to sell the property. Kimball applied to Wouters, defendant's husband, who acted as her agent in the transaction, to buy part of lot 5. The lodge would not sell the property without imposing restrictions against its use for laundry purposes, but consented a building might be erected thereon to be used as a collecting and distributing station in connection with the laundry business of defendant's husband and for other purposes. Wouters was engaged in the laundry business and had in course of construction on West Harrison street a building with stores in front and garages in the rear. Kimball desired to know what kind of a building would be constructed on lot 5, and Wouters sent him to see the building he was constructing on West Harrison street, with which Kimball

was satisfied. Wouters pointed out that he could not use the buildings he desired to construct if he purchased lot 5 unless he had a passageway from the street to and from the rear. He made a sketch of the plans of the buildings he proposed if he bought the property, which required a ten-foot alleyway, and provision for it was a condition of the purchase of the property. Defendant paid \$6700 for the property, and after acquiring it spent something over \$9000 in improving it by the erection of buildings thereon. The building erected for garages in the rear of the one-story brick on the front fifty-four feet of the lot had no communication with any street except through the private alleyway on the south side of said lot 5. After the complainant bought lot 6 and the south ten feet of lot 5, subject to the easement, she improved the property with buildings up to the line of the south ten feet but never encroached upon the alleyway until December, 1917. Both parties used the alley for vehicles to pass to and from the street to the rear of their respective premises. It was clearly the intention of defendant and her grantor that she was to have a ten-foot passageway for vehicles in connection with the use of her property, and the appellant had both actual and constructive notice of this fact. The right to have the ten-foot space kept open as a passageway for her use was a covenant running with the land and was in no way limited or restricted by the grantor's right to abandon its intention to build a hall, and liability for its performance, or the right to enforce it, passed to the assignee of the land. *Gerling v. Lain*, 269 Ill. 337; *Dorsey v. St. Louis, Alton and Terre Haute Railroad Co.* 58 id. 65.

The decree of the circuit court is supported by the law and the evidence and is affirmed.

Decree affirmed.

(No. 12555.—Decree modified.)

THE THURBER ART GALLERIES, Plaintiff in Error, vs. THE
RIENZI GARAGE *et al.* Defendants in Error.

Opinion filed April 15, 1919.

1. EQUITY—*when equity has no jurisdiction.* Where the only relief sought by a bill is to compel the return of an automobile or recover damages for its conversion a court of equity has no jurisdiction, as an action of replevin will secure the one form of relief and an action of trover the other; and the fact that the defendant has obtained a judgment for a garage-keeper's lien in an action of replevin does not give the complainant the right to equitable relief.

2. SAME—*the want of jurisdiction of the subject matter cannot be waived.* Where the subject matter of a bill is wholly foreign to equity the want of jurisdiction cannot be waived and the bill should be dismissed without prejudice.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. CHARLES M. FOELL, Judge, presiding.

POULTON, GREEN & MERRICK, (SAMUEL B. HILL, of
counsel,) for plaintiff in error.

JOHN A. BLOOMINGSTON, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Fiftieth General Assembly amended the act to revise the law in relation to liens by adding four new sections to it, by which garage keepers were given a lien upon motor vehicles for the proper charges due for keeping and repairing them and for expense bestowed on them at the request of the owner or the person having the possession thereof, and were authorized to replevy them for the purpose of enforcing the lien. It was provided that a garage keeper having a lien under the act might enforce it by a sale of the property in his possession on giving ten days' notice in writing to the owner of the time and place of sale, and might out of the proceeds of the sale pay the

amount of the claim and costs, and the surplus, if any, to the owner of the property. (Laws of 1917, p. 567.)

The Thurber Art Galleries filed its bill in the superior court of Cook county, in which it alleged that it was the owner of an automobile which it used in its corporate business, and that during December, 1917, and January and February, 1918, it was stored by the complainant's president, Seymour J. Thurber, in the garage of the Rienzi Garage, which in December made some repairs on the automobile for which the complainant paid \$100, leaving a balance due on January 2, 1918, of \$10.02. On March 11, 1918, the Rienzi Garage brought a replevin suit under the act which has been mentioned, and recovered a judgment for the possession of the automobile and one cent damages, the court finding that it was entitled to a lien on the automobile for \$38; that on March 22, 1918, the Rienzi Garage mailed to the complainant a notice of a lien on the automobile for \$216.97, stating that a sale of the automobile would be made to satisfy the lien at ten o'clock in the morning of April 3, 1918, but not stating the place where the sale would be made. The bill alleges that the act in question was unconstitutional for various reasons, and states that on the morning of April 3, 1918, before ten o'clock, the agents of complainant went to the garage and inquired where the sale would take place. They experienced some difficulty and delay in learning where the sale would be held, and finally arrived on the second floor of the garage about three minutes after ten and were informed that the sale had already taken place, and that Walter Schmidt, the son of Otto Schmidt, the president of the Rienzi Garage, bought the automobile, but Otto Schmidt refused to answer at what time the sale occurred or the price paid. The bill charges, upon information and belief, that there was no *bona fide* and valid sale held, and avers that there was no lien on the automobile except for the sum of \$38, which the complainant tendered to the Rienzi

Garage before the sale was made; that Walter Schmidt claims to be the owner of the automobile and refuses to give possession of it to complainant and threatens to sell it. The prayer of the bill was that the act of the legislature be declared to be unconstitutional; that the sale of the automobile be set aside; that the defendants be decreed to pay whatever sum may be found owing to the complainant by reason of the conversion of the automobile; that Walter Schmidt be restrained from selling or otherwise disposing of it until the further order of the court, and that the Rienzi Garage be decreed to return the automobile to the complainant.

The defendants answered the bill, admitting the storing of the automobile, the replevin suit and the judgment of the municipal court; averring the furnishing of supplies and repairs and the existence of a lien under the statute in question for the sum of \$216.97. The answer avers the mailing of notice to the complainant of the time and place of selling the automobile to satisfy the lien; that the sale was made on April 3, 1918, at the garage, at which an agent of the complainant was present, and a sale was made in good faith to Walter Schmidt, who is ready and willing to deliver the automobile to the complainant on the payment of the lien and costs; that the tender of \$38 and costs was made and refused because the lien exceeded that amount, and that the defendants have not sold the automobile or threatened to sell it, nor would they sell it until the disposition of this case.

A hearing was had on the pleadings and evidence, at which it appeared that Seymour J. Thurber, the president of the Thurber Art Galleries, used the automobile in the business of the company, and that at his request the defendants in error stored it and rendered services in connection with it; that the defendants in error replevied the automobile in March, 1918, from Thurber, and a judgment was rendered in its favor for the possession of the auto-

mobile and one cent damages, and that it was entitled to a lien on the automobile for \$38. The automobile was sold at the sale to Walter Schmidt, the treasurer of the Rienzi Garage, for \$210, which amount was charged against him on the books of the corporation. The court entered a decree dismissing the bill for want of equity, and the complainant has sued out a writ of error from this court on the ground that the constitutionality of the law is involved.

A court of equity has no jurisdiction of this cause, either upon the allegations of the bill or the facts developed upon the hearing. The only relief which could be granted or which the plaintiff in error seeks is the return of the automobile or damages for its conversion. An action of replevin will secure the one form of relief; an action of trover the other. The bill prays that the sale may be set aside, but there is no need of that. If the law did not authorize the sale or the defendants in error did not observe the provisions of the law in making the sale, the sale will be void and will present no obstacle to the enforcement of its rights by the plaintiff in error in the suit at law. There is no allegation of any fact amounting to fraud.

The plaintiff in error argues that the judgment in the action of replevin by which the defendants in error got possession of the automobile is a bar to an action of replevin by the plaintiff in error. That judgment was not against the plaintiff in error, and if it were, the fact that the plaintiff in error had neglected to make defense in that action or that it had defended unsuccessfully would not give it the right to go into equity to secure the rights which it ought to have obtained in the previous suit.

The bill prays for an injunction against the sale of the automobile, but no facts are stated on which such prayer can be based.

The defendants in error have not raised the question of the jurisdiction of equity, but the subject matter of the bill

is wholly foreign to equity jurisdiction and want of jurisdiction of the subject matter cannot be waived. The bill was properly dismissed for want of equity, but it should have been without prejudice. The decree will be modified so as to make the dismissal without prejudice, and each party will pay half the costs in this court.

Decree modified.

(No. 12530.—Judgment affirmed.)

THE BARRETT COMPANY, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(L. O. EAGLETON, Admr., Plaintiff in Error.)

Opinion filed April 15, 1919.

WORKMEN'S COMPENSATION—*notice of the accident is jurisdictional.* The provision of the Workmen's Compensation act requiring notice of the accident to be given the employer within thirty days is jurisdictional, and an award cannot be sustained if there is no evidence upon which a finding of notice within such time can be based.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. C. V. MILES, Judge, presiding.

ROSCOE HERGET, for plaintiff in error.

FRANK M. COX, and GEORGE W. SPRENGER, for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

Henry Keefe died on December 19, 1916, and a claim for compensation for his death was presented under the Workmen's Compensation act against the Barrett Company. The arbitrator found that notice of the accident was not given to the employer and demand for compensation was not made upon it within the time required by the provisions of the act. The Industrial Commission reviewed

this decision and made an award in favor of the claimant. Upon a writ of *certiorari* the circuit court of Peoria county set aside the finding of the commission, and the claimant has sued out a writ of error to reverse this judgment.

No one saw the supposed accident in which the deceased received his injury. There is no evidence in the record of such accident except the statements of the deceased made to the foreman under whom he worked and the superintendent of the defendant in error's plant. The deceased was a paper maker and millwright and had been employed by the defendant in error for seventeen years. His death occurred from infection of his right hip and bone, which there is evidence tending to show had been caused by an external injury which did not break the skin. Dr. Trewyn began treating him some time in September. W. R. Holmes was the foreman under whom the deceased worked, and he testified that Keefe quit work on Saturday, September 23; that he had complained for three or four weeks of having rheumatism, and on September 23 Holmes told him he had better stay home the next day and when he got well to come back. About a week later Keefe told him that he had been struck on the hip by a rag-truck pushed by a negro employee of the defendant in error while he was engaged in his work. He could not state how long before the 23d the deceased told him he got struck but as near as he could state it was a month or six weeks. He could not say whether it was less than a month. Hennessy, the superintendent of defendant in error, testified that Keefe came down to see him and said that he thought for a long time his trouble was rheumatism but that he believed now it was due to being squeezed between the truck and the beaters. He said that the truck was moved or being pushed by someone and crowded him in between the truck and the beaters. He did not fix the time or any approximate time. He gave the approximate time as a month or two months. As to the time he had been struck by the truck

he could not remember himself. This was all the evidence in regard to when the accident occurred.

The statute requires that notice of the accident be given the employer within thirty days, and this requirement is jurisdictional. (*Bushnell v. Industrial Board*, 276 Ill. 262.) Since there is no evidence in the record from which it can be found that notice was given to the employer within thirty days after the accident the Industrial Commission was without jurisdiction and its award was properly set aside.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12553.—Judgment affirmed.)

TIMOTHY COMPTON, JR., Admr., Plaintiff in Error, *vs.*
THE INDUSTRIAL COMMISSION *et al.*—(THE BOARD OF
EDUCATION, Defendant in Error.)

Opinion filed April 15, 1919.

1. WORKMEN'S COMPENSATION—*when school board is not engaged in hazardous occupation under paragraph 8 of section 3 of Compensation act.* A board of education in maintaining a school building is not engaged in a hazardous occupation under paragraph 8 of section 3 of the Workmen's Compensation act, where there is no showing that the building is subject to any statutory regulations or to any regulatory municipal ordinances.

2. SAME—*when janitor of school house is not engaged in employment connected with building.* The janitor of a school house is not engaged in an employment connected with the school building while occupied in trimming trees on the school grounds, and an injury sustained at such occupation does not arise out of or in the course of employment in the conduct and management of the school building.

WRIT OF ERROR to the Circuit Court of Vermilion county; the Hon. WALTER BREWER, Judge, presiding.

STEPHENS & WICKS, (WILBUR R. WICKS, of counsel,) for plaintiff in error.

CHARLES TROUP, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Timothy Compton, Sr., plaintiff in error's intestate, on June 24, 1915, while engaged in trimming a tree in the grounds of a public school house in Danville, fell and received injuries from which he died. His administrator made application for an award of compensation under the Workmen's Compensation act. The arbitrator who heard the application made an award. On review the Industrial Commission reversed the decision of the arbitrator and denied an award. The decision of the Industrial Commission was reviewed by the circuit court on a writ of *certiorari* and the decision of the commission sustained. The court certified the cause was a proper one for review by the Supreme Court, and the record is brought before us by writ of error.

The case was heard by the arbitrator and by the Industrial Commission on a stipulation of facts. It was agreed that defendant in error was engaged in maintaining public schools in Danville, Illinois, for the free education of the children and was not engaged in any other business or enterprise; that deceased had for several years prior to his injury worked for the defendant in error as janitor; that neither of the parties had elected to accept and be subject to the Workmen's Compensation act; that during the vacation period deceased worked for defendant in error for \$2 per day and during the school period for \$55 per month, and that he died as the result of a fall on June 24, 1915, from a tree he was trimming in the Grant school grounds, in Danville.

Plaintiff in error concedes defendant in error, not having elected to provide compensation under the Workmen's Compensation act, is not liable unless it is engaged in an enterprise, business or occupation denominated as extra-

hazardous by section 3 of that act, but contends that by paragraph 8 of section 3 it is engaged in such extra-hazardous business or occupation. Said paragraph 8 reads: "In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous."

The statutory regulations relied on by plaintiff in error are the provisions which make it the duty of boards of education to provide and maintain schools for not less than six nor more than ten months each year, give the board control and supervision of school houses and authorize them to build, repair and improve them; also the statute requiring the doors leading out of public buildings, including school houses, "now in process of construction or hereafter to be built," to be so constructed as to open outward; and the Fire Escape act, which provides that all buildings more than two stories in height used for schools shall be provided with a fire-escape for each fifty persons accommodated above the second story. It is not shown by the record that the statutory regulations of school buildings relied on apply to the Grant school building. It nowhere appears that it was more than one story high, or that it was in process of construction or was built after the act came in force requiring the doors of public buildings "now in process of construction or hereafter to be built" to be so constructed as to open outward. In other words, it was not shown that the school building was subject to the statutory regulations referred to, and the record contains no regulatory municipal ordinance.

Even if defendant in error, in the conduct and management of the school building, had been engaged in an extra-hazardous business, enterprise or occupation, the injury did

not arise out of or in the course of the deceased's employment in that business. He was not injured while engaged in the performance of any duty of his employment in or connected with the school building. *Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, is clearly distinguishable from this case. This court said in substance in *Marshall v. City of Pekin*, 276 Ill. 187, that an employer engaged in an extra-hazardous occupation, who has not elected to be bound by the Workmen's Compensation act, cannot be compelled to provide compensation under the act for an employee injured in an occupation not extra-hazardous under the statute, simply because such employer is also engaged in an extra-hazardous employment. To the same effect are *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, *Sanitary District v. Industrial Board*, 282 id. 182, and *Fruit v. Industrial Board*, 284 id. 154.

The circuit court did not err in approving the decision of the Industrial Commission. The judgment is affirmed.

Judgment affirmed.

(No. 12361.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. ARTHUR SCHOOP, Plaintiff in Error.

Opinion filed April 15, 1919.

1. CRIMINAL LAW—when Supreme Court will not reverse judgment of conviction on evidence. The Supreme Court will not reverse a judgment of conviction on the evidence merely because only one witness testifies to the commission of the crime and he is contradicted by the accused.

2. SAME—when, only, Supreme Court will interfere on ground that evidence does not support the verdict. It is only when the Supreme Court is able to say, from a careful consideration of the whole testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused that it will interfere on the ground that the evidence does not support the verdict.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JACOB H. HOPKINS, Judge, presiding.

WILLIAM A. JENNINGS, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and SUMNER S. ANDERSON, (EDWARD E. WILSON, of counsel,) for the People.

Mr. CHIEF JUSTICE DUNCAN delivered the opinion of the court:

Plaintiff in error, Arthur Schoop, (otherwise called Arthur Shupe,) was indicted and convicted in the criminal court of Cook county for the larceny of \$90 in money and was sentenced to an indeterminate term in the reformatory at Pontiac. He has sued out this writ of error to review the judgment and sentence.

The sole complaint against the verdict and judgment in this case by plaintiff in error is that the evidence is insufficient to sustain them.

Only three witnesses testified: Louis Maraino, the prosecuting witness; H. J. Crowley, a detective or police officer of the city of Chicago who was assigned to the pick-pocket detail, and plaintiff in error. The prosecuting witness testified, in substance, that on Decoration day, 1918, between nine and ten o'clock in the evening, he and his little girl, about ten years of age, boarded a Twelfth street car at Kedzie avenue and rode one block to Troy street. They boarded the car in advance of other passengers and walked through it to the front end and Maraino told the motorman to let them off. Plaintiff in error and another man stood behind him as the motorman opened the door, who interfered with his getting off of the car. The man who was with plaintiff in error got in front of the prosecuting witness and pretended to be drunk and prevented the

prosecuting witness from getting off of the car, while the plaintiff in error stood at his side and a little to his rear and went through his pocket and took therefrom a pocket-book containing all of his money, \$90 in United States currency and some forty or fifty cents in change, and also a check for \$9.58 and a receipt for a Liberty bond. After getting his pocket-book and valuables aforesaid plaintiff in error shoved the prosecuting witness off of the car, and the motorman closed the car door and immediately applied the power and drove the car away at such a rate of speed that the prosecuting witness was not able to again enter it. He then went to his place of business on Kedzie avenue and called up the police and reported his loss. On the following Monday he went to the detective bureau and in the presence of policeman Crowley inspected seven or eight prisoners, among whom was plaintiff in error, and positively identified him as the man who picked his pocket. He further testified that plaintiff in error, at the time he stole the money and other valuables, wore a dark suit of clothes and a felt hat; that he did not remember the color of the hat but was able to positively identify the plaintiff in error at the detective bureau and at the trial by his face, of which he had good view at the time he was robbed, and that he did not identify or point out anyone other than plaintiff in error at the detective bureau as the party who picked his pocket.

The substance of policeman Crowley's testimony is that he arrested the plaintiff in error on Sunday following the theft, and on the next day (Monday) took the prosecuting witness to the detective bureau, with other persons whose pockets had been picked, and told them that he would bring the prisoners in and for them to look them over carefully and see if they could identify any of the prisoners as the person or persons who had picked their pockets, and to be sure about the identification and to make no guesses; that

the prosecuting witness identified plaintiff in error and no one else as the person who had picked his pocket and then filed a complaint against him, and that he identified plaintiff in error in the presence of six other prisoners.

Plaintiff in error testified in his own behalf and denied that he wore a felt hat and a dark suit of clothes on Decoration day, and also denied that he was the owner of any such a suit of clothes. He further denied that he was on a Twelfth street car on that day and also positively denied that he had picked the pocket of Maraino, and testified that he had never seen Maraino in all his life until Maraino identified him at the police station. He did not testify or offer to prove by any witness where he was on Decoration day or with whom he was associated. While he testified that the prosecuting witness identified another man at the detective bureau as the person who picked his pocket he offered no corroborating testimony in proof of that claim, and the testimony of the police officer and the prosecuting witness was very positive to the effect that his testimony in this particular is untrue.

This court will not reverse a judgment of conviction on the evidence merely because only one witness testifies to the commission of the crime and is contradicted by the accused. (*People v. Zurek*, 277 Ill. 621.) In *Gainey v. People*, 97 Ill. 270, this court said: "The most important and useful function which the jury is required to perform is to determine on which side of a controversy the real truth lies where the testimony as to the material facts is directly in conflict and irreconcilable, and its conclusion in such case of necessity depends largely upon the credit to be given to the opposing witnesses, hence it is universally admitted to be the peculiar province of the jury to determine the credibility of the witnesses." It is only when this court is able to say, from a careful consideration of the whole testimony, that there is clearly a reasonable and

well founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict. (*People v. Grosenheider*, 266 Ill. 324; *Graham v. People*, 115 id. 566.) This must necessarily always be the rule where the court has committed no error in its ruling or where no such errors are complained of and no other improper conduct of the jury or of counsel is shown, as it was never the intention of the law that the court should usurp the province of the jury.

The evidence in this case, when considered as a whole, is amply sufficient to sustain the verdict of the jury. The testimony of the plaintiff in error is a very unsatisfactory story when considered as a whole. Plaintiff in error ought to have been able to give some account of himself as to where he was on Decoration day and with whom he was associating,—at least if he cannot do so he ought to furnish some satisfactory reason for not doing so. There is absolutely no attempt on the part of plaintiff in error to furnish any account of himself at the time this larceny was committed or to offer any excuse or reason why he did not do so. There is nothing in this record that would warrant a jury to return a verdict of not guilty in favor of plaintiff in error, against the positive testimony of the prosecuting witness, except the bare denial of plaintiff in error himself of the main incriminating facts, elicited by direct questions propounded to him by his counsel. Besides, he is positively contradicted in a very material matter by both the prosecuting witness and policeman Crowley. The judgment and sentence of the court, under such a state of the evidence, should be and are affirmed.

Judgment affirmed.

(No. 12381.—Decree affirmed.)

MARGARET DUNN *et al.* Appellees, *vs.* HOWARD KEARNEY
et al. Appellants.

Opinion filed April 15, 1919.

1. WILLS—*when devise is of a fee simple.* A devise of all the testator's real estate to his brother, "to have and to hold the same to him and his heirs forever," is a devise of a fee simple title, and the rule in *Shelley's case* has no application.

2. SAME—*when devise will lapse.* A legacy or devise will lapse where the legatee or devisee dies before the death of the testator.

3. SAME—*re-publication of the will by codicil does not revive lapsed devise.* Where a codicil disposing of certain lapsed legacies makes no reference to a clause of the will creating a devise of a fee which has lapsed by the death of the devisee, the re-publication of the will by the execution of the codicil does not affect such a clause nor create a new and different devise from that which has lapsed, so as to vest the fee in the heirs of the deceased devisee.

4. SAME—*when a devise will be sustained by implication.* Devises by implication are sustained where there is clearly shown in the will an intention on the part of the testator to make a devise, although, in fact, he has not done so by formal language in the will.

5. SAME—*a devise by implication cannot rest upon conjecture.* To uphold a gift by implication the inference from the will of the testator's intention cannot rest upon conjecture but must be such as to leave no hesitation in the mind of the court and permit of no other reasonable inference.

6. SAME—*if possible, a lapsed legacy or devise will sink into residuary clause.* If a legacy or devise lapses and there is a general residuary clause broad enough in terms to embrace it such legacy or devise will sink into the residuum; and this rule is based on the presumed intention of the testator that the residuary clause shall include everything not effectually devised or disposed of.

7. SAME—*particular mode of expression not necessary to constitute residuary clause.* The term "residue" means that which remains, and no particular mode of expression is necessary to constitute a residuary clause.

8. SAME—*a residuary clause should be construed to prevent intestacy.* A residuary clause should be so construed as to prevent intestacy of any part of the testator's estate unless there is an apparent intention to the contrary.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. JAMES S. BAUME, Judge, presiding.

SHEEAN & SHEEAN, and JAMES M. SHEEAN, for appellants.

MARTIN J. DILLON, and F. J. STRANSKY, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Jo Daviess county sustaining the bill of appellees for partition. The questions presented to this court involve the construction of the last will and testament of Hamilton Kearney, deceased, and a codicil thereto.

The will in question was executed December 31, 1898. The portions of the will necessary to a decision of this case are as follows:

"Second—I give, devise and bequeath to my brother John Kearney all of my real estate, to have and to hold the same to him and his heirs forever.

"Third—I give, devise and bequeath to my dear friend Mrs. Jane Mosely the sum of \$1000 and my old gray mare, buggy and harness; also, if she remains with me until my death, I give, devise and bequeath to her all my household goods of every description, including all articles in the cellar, but she shall not have power to sell the same but may give them away if she feels so disposed, but it is my express wish that they be not sold.

"Fourth—I give, devise and bequeath to my friend Mrs. Daisy Matthews the sum of \$500.

"Fifth—I give, devise and bequeath to the widow of my brother David Kearney, Mrs. Rebecca Kearney, the sum of \$500.

"Sixth—It is my will that my executor shall sell and convert into money all the grain and live stock remaining

in my possession at the time of my death, and the proceeds of the same, together with the residue of my estate after the payment of the legacies and bequests heretofore set forth, shall be divided equally among my nephews and nieces who are living at the time of my death, and William Hamilton Bertsch, who is the only relative bearing my name and the son of my niece, Mrs. Emma Bertsch. The names of my nephews and nieces, the children of my brothers John and David, and my sister, Mrs. Ann McKinley, are Mrs. Mary Knapp, William Kearney, son of David Kearney, Howard Kearney, John Kearney, Mrs. Ruth Schaible, Sarah Kearney, and Bessie Kearney, William Kearney, son of my brother John Kearney, Mrs. Margaret Dunn, Anna Kearney, John McKinley, George McKinley, they each, together with my namesake, William Hamilton Bertsch, to take share and share alike in the residue of my estate as hereinbefore set forth."

On June 29, 1912, Hamilton Kearney made the following codicil, to-wit:

"Whereas, I, Hamilton Kearney, did on the thirty-first day of December, 1898, make my will; and whereas in said will I did in clause 3 of my said will give, devise and bequeath to Mrs. Jane Mosely the sum of \$1000 and other property, and also in clause 4 of my said will I bequeathed to Mrs. Daisy Matthews the sum of \$500; and whereas in the dispensation of Providence my friend Mrs. Jane Mosely has departed this life, and by her last will and testament she has provided for her daughter, the said Mrs. Daisy Matthews above mentioned; therefore it is my will that the sums mentioned in clauses 3 and 4 of my will bequeathed to Mrs. Jane Mosely and Mrs. Daisy Matthews shall not be considered and are hereby canceled, and the sums mentioned therein shall be divided equally by my executor among my nephews and nieces mentioned in clause 6 of my will, and William Hamilton Bertsch, he taking an equal portion with each of them."

William Kearney, son of David Kearney, one of the nephews named in the original will, died before the death of the testator.

Prior to 1886 Robert Kearney, Hamilton Kearney and John Kearney owned and occupied the land in question, consisting of 472 acres in JoDaviess county, as tenants in common. Robert and Hamilton Kearney were never married and lived with their brother John. Prior to his death, on February 24, 1886, Robert Kearney executed his last will and testament, in which he gave to Hamilton and John Kearney, his brothers, all his interest and share in said real estate. This will was duly probated and entered of record. After the death of Robert, his brothers, Hamilton and John, lived upon and farmed said premises as tenants in common until December 4, 1904, at which time John died intestate, leaving a widow and children surviving him. On June 29, 1912, William Kearney, son of John Kearney, and his mother, occupied the premises, and Hamilton Kearney made his home with them. Hamilton Kearney died in January, 1916, leaving personal estate aggregating \$9666.15 and an undivided one-half interest in said 472 acres, which undivided one-half is the land in question. The complainants are the daughters of David Kearney, a brother of John, Robert and Hamilton, who died some twenty years prior to the death of Hamilton.

The decree of the circuit court found, as alleged in the complainants' bill, that the devise contained in the second clause of the will lapsed and that the sixth clause of the will included the lapsed devise, so as to vest in each of the testator's nephews and nieces an undivided one-seventeenth of testator's undivided half of said premises, and that a like share in said estate was vested in William Hamilton Bertsch, son of Emma Bertsch, a niece of the testator.

The seven children of Annie McKinley, deceased sister of Hamilton Kearney, who were made defendants below, entered their appearances in the circuit court and answered,

admitting the allegations of the bill and that the relief prayed for should be granted. They appear here urging that the decree of the circuit court be affirmed.

Appellants, who are the seven children of John Kearney, deceased, contend that under the will, as modified by the codicil, Hamilton Kearney devised his interest in said real estate to them, the heirs of John Kearney; that the testator, knowing that his brother John was dead when the codicil was executed, re-published the original will, and by clause 2 in effect devised all of his lands to the heirs of John Kearney, or that if said legacy lapsed, as charged in complainants' bill, then said real estate descended as intestate property to the sixteen nieces and nephews to the exclusion of William Hamilton Bertsch, who is not an heir of Hamilton Kearney; that the sixth clause did not include real estate, and that final division under said sixth clause had been made by the executor and accepted by the legatees thereunder.

By the second clause of the will the testator gives and devises to his brother John Kearney all of his real estate, "to have and to hold the same to him and his heirs forever." He by this clause devised a fee simple title to the lands in question to his brother John. The ordinary form of a conveyance of a fee at common law was to the grantee and his heirs. (*Winter v. Dibble*, 251 Ill. 200.) It is contended by appellees that said second clause of the will is a devise within the rule in *Shelley's case*. The rule as stated by Coke (vol. 1, 104a,) is, that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase." The clause in question does not purport to devise to John Kearney a freehold estate with a limitation by way of remainder to his heirs, but said clause is a devise to John Kearney and his heirs,

which is the proper mode for devising a fee simple. The words "to have and to hold the same to him and his heirs forever" are not the words necessary to be employed to confer a freehold upon the ancestor with a remainder to his heirs, but are the words which in a will or conveyance transfer the fee. The rule in *Shelley's case*, therefore, has no application to this devise. *Johnson v. Buck*, 220 Ill. 226.

John Kearney died subsequent to the execution of the original will in question and prior to the making of the codicil thereto. The general rule is that a legacy or devise will lapse where the legatee or devisee dies before the testator. (40 Cyc. 1925, and cases there cited.) As we understand the contention of appellants, this is not disputed, but they contend that when the testator executed the codicil to his will without making any reference to the second clause of the original will, although he then knew of the death of his brother John, he in executing the codicil republished the will as of the date of the codicil, and that the legal effect of such re-publication was to vest the fee to the real estate in the appellants, heirs of said devisee, John, and it is contended that parol evidence should have been admitted to show the circumstances surrounding the testator at the time the codicil was executed, as proof of his intention to so devise said real estate. As we have seen, by the language of the original will the testator devised a fee simple to his brother John. This being so, the grant to "his heirs forever" could not be held to be a devise to certain of his heirs, and unless there be found in the codicil language which constitutes a devise in terms, the fact that the will as re-published contains a lapsed devise is not, of itself, sufficient to vest the title to the property described in the lapsed devise in the heirs of the deceased devisee, where such devisee was given a fee.

While the execution of a codicil operates as a re-publication of the will, (*Defrees v. Brydon*, 275 Ill. 530; *Mosser v. Flake*, 258 id. 233; *Hobart v. Hobart*, 154 id. 610;)

yet a codicil does not operate to alter the original will except where it so designates. (*Doe v. Kett*, 4 Durn. & East, 601; *Comfort v. Mather*, 2 Watts & S. 450; *Campbell v. Jameson*, 8 Pa. St. 498.) In the case of *Doe v. Kett*, *supra*, the testator devised certain real estate "to Elizabeth Folsom and the heirs of her body lawfully to be begotten." Elizabeth Folsom died during the lifetime of the testator and prior to the date on which the testator made a codicil to his will. It was there contended that the execution of the codicil was a re-publication of the will, and that, inasmuch as Elizabeth Folsom had died prior to the time of the making of the codicil, leaving a son, which facts were then known to the testator, the testator must have intended by the codicil that said son should take the property under the words of the original devise, "to Elizabeth Folsom and the heirs of her body lawfully to be begotten." But it was there said by Lord Kenyon, chief justice, that the codicil "would operate as a re-publication of the will for many purposes, such as that of passing lands purchased after making the will, but not so as to alter the will. * * * If this codicil were sufficient to pass the estate to the representatives of E. Folsom there never would be a lapsed legacy when there was a re-publication of the will but it would always go in favor of the executors of the legatees deceased." To the same effect are the cases of *Comfort v. Mather*, *supra*, and *Campbell v. Jameson*, *supra*.

Counsel for appellants rely upon the case of *Davis' Heirs v. Taul*, 6 Dana, 51. We do not adopt the view announced in that case, but hold the true rule to be that where the codicil makes no reference to a clause of the will creating a devise which has lapsed, the re-publication of the will by the execution of such codicil does not alter such clause of the will nor create a new and different devise from that which has lapsed.

But it is urged that by the codicil there arose in the language of the will, when considered with the codicil, a

latent ambiguity, which makes admissible parol testimony to show the intent of the testator, and that if such testimony be admitted it would establish a devise by implication. Devises by implication are sustained where there is clearly shown an intention on the part of the testator to make a devise, as where a recital in the will is to the effect that the testator has devised something in another part of the will when, in fact, he has not done so, the erroneous recital operating as a devise of such property by implication, for the reason that it shows an intention to devise the property by the will. (*Noble v. Tipton*, 219 Ill. 182.) So in a case where a devise is not made in formal language by the will, the gift will be sustained by implication when the probability of the intention of the testator to make the gift is so strong that a contrary intention cannot be shown. (*Martin v. Martin*, 273 Ill. 595.) So, also, where there are no express words of gift but an intention to make a gift clearly appears from the will as a whole, such gift will be sustained as a gift by implication. (*Connor v. Gardner*, 230 Ill. 258; Rood on Wills, sec. 495.) To uphold a gift by implication the inference from the will of the testator's intention cannot rest upon conjecture but must be such as to leave no hesitation in the mind of the court and permit of no other reasonable inference. (*Connor v. Gardner*, *supra*, and cases there cited.) Examining the codicil in question in the light of these rules, we are unable to discover such an intention on the part of the testator as to bring the devise of the real estate in question within such rules, and appellants do not point out wherein such intention may be found. On the other hand, it is evident from the codicil that such an intention rests wholly in the realm of conjecture; that the only clauses to be affected by it were clauses 3 and 4, which give certain legacies to Jane Mosely and her daughter, Daisy Matthews. The testator, by the use of the term "whereas" in said codicil, clearly indicates that the only reason for making

the codicil was the fact that Jane Mosely had died and had provided for her daughter, Daisy Matthews. These legacies he directs shall be divided among his nieces and nephews and William Hamilton Bertsch. There is nothing in the will and codicil, considered together or separately, to indicate that any clauses other than 3 and 4 were to be affected. We are of the opinion that no gift by implication was made, as contended by appellants.

Appellants further contend that if the re-publication of the will did not create a devise of the real estate to them, then such real estate passed as intestate property and not as a part of the residuum of the estate, for the reason that the residuary clause (clause 6) is not broad enough, in terms, to include real estate. The testator by clause 6 directs that his executor sell and convert into money certain personal property, and further directs that "the proceeds of the same, together with the residue of my estate after the payment of the legacies and bequests heretofore set forth, shall be divided," etc. Appellants contend this language is not broad enough to include the real estate in question. The general rule is, that if a legacy or devise lapses and there is a general residuary clause broad enough in terms to embrace it, such legacy or devise will sink into the residuum. This is based on the presumed intention of the testator that the residuary clause shall include everything not effectually devised or disposed of. (*Dorsey v. Dodson*, 203 Ill. 32.) This rule is further aided by the presumption of law that where a man dies testate he intended by his will to dispose of all of his property and leave no part of his estate intestate. (*Martin v. Martin*, *supra*; *Eyer v. Williamson*, 256 Ill. 540; *Wixon v. Watson*, 214 id. 158; *Greenwood v. Greenwood*, 178 id. 387; *Hayward v. Loper*, 147 id. 41.) The term "residue" meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. (40 Cyc. 1563.) It is a general rule to so construe a residuary clause as to pre-

vent the intestacy of any part of the testator's estate unless there is an apparent intention to the contrary. (*Dorsey v. Dodson, supra*; *Davis v. Davis*, 62 Ohio St. 411; *In re Fuller*, 225 Pa. St. 626.) Here the testator designated the residuum of his estate as "the residue of my estate." There is nothing in the will to indicate the exclusion of this real estate therefrom and nothing to indicate that he intended that said real estate should pass as intestate property. We are therefore of the opinion that said real estate passed under the sixth or residuary clause of the will, and that the circuit court did not err in so finding.

There appearing to be no error in the record, the decree of the circuit court will be affirmed.

Decree affirmed.

(No. 12567.—Decree affirmed.)

KATHERINE POEHLMAN *et al.* Defendants in Error, *vs.*
ELIZABETH LEINWEBER *et al.* Plaintiffs in Error.

Opinion filed April 15, 1919.

1. DEEDS—*construction of the words "and" and "or."* Courts will construe the word "and" as meaning "or," and conversely, where such construction is necessary to give effect to the intention of the grantor.

2. SAME—"descendants" take as purchasers in grant to "children and their descendants." Where a grant in a deed is to "children and their descendants," the words "and their descendants" are to be construed as words of purchase.

3. SAME—*descendants take by way of substitution, only, in a grant to several and their descendants.* Unless the instrument creating the estate indicates a contrary intention in a grant to several and their descendants the descendants will take by way of substitution, only, and not in competition with their parents living at the time of distribution.

4. SAME—*when remainder to children and their descendants is vested.* Where there is nothing in the deed to indicate that the descendants are not to take in substitution in a grant of a remainder to children and their descendants, the remainders will vest in

the children in being at the time the deed is made, subject to reduction by birth of other children and subject to defeasance by the death of any child before the termination of the particular estate, in which event descendants will take their deceased parent's share.

WRIT OF ERROR to the Circuit Court of Mason county;
the Hon. GUY R. WILLIAMS, Judge, presiding.

LYMAN LACEY, JR., for plaintiffs in error.

SCOTT S. NORTRUP, guardian *ad litem*, and EDMUND P.
NISCHWITZ, for defendants in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

March 15, 1888, Martin Leinweber and wife executed and delivered a quit-claim deed to John E. Leinweber and Elizabeth Leinweber, conveying to the grantees 240 acres of land "for and during the natural life of the former [John E. Leinweber] only, and for and during the widowhood of the latter [Elizabeth Leinweber] as a widow of the said John E. Leinweber only, in case she survives him, with remainder over to the children and their descendants of the said John E. Leinweber upon the decease of both of said grantees, as well as upon the decease of John E. Leinweber and the re-marriage of said Elizabeth Leinweber." The grantees in the deed were husband and wife. At the time the deed was made there were nine children of John E. and Elizabeth Leinweber, none of whom then had any issue. Subsequently two more children were born to the grantees. One son, Henry Leinweber, died March 8, 1916, leaving five minor children surviving him. John E. Leinweber died September 27, 1916, leaving surviving him ten children and five grandchildren, the children of the deceased son, Henry, as his only heirs-at-law. The widow also survived him and is still living. Since the deed was made nine of the ten surviving children of John E. Leinweber have

had children born to them who are now living. One has had no children. The ten surviving children of John E. Leinweber filed their bill in the circuit court of Mason county for partition. The bill alleged that the complainants were each seized in fee simple of one-eleventh part of the land described in the deed, and that the five children of Henry Leinweber, deceased, were each seized of one-fifty-fifth part thereof, subject to the life estate or estate during widowhood of Elizabeth Leinweber. The bill further alleged that all the children of complainants are contending that they have an interest in the premises under the deed as descendants of their parents, which claim creates a cloud upon the title, and it is alleged that it is necessary to the other relief prayed that the deed be construed, in order that the title of complainants and of the children of Henry Leinweber may be freed from the cloud created by the claims and contentions of the children of complainants. All of said children of complainants were made parties, and as some of them were minors a guardian *ad litem* was appointed for them, and another person was appointed guardian *ad litem* for the minor children of Henry Leinweber. The guardians *ad litem* filed separate answers and the adult defendants were defaulted. The cause was referred to the master in chancery to take and report the testimony, and upon the hearing the chancellor found and decreed that Elizabeth Leinweber was the owner of a life estate in the 240 acres, subject to be divested by her marriage; that, subject to her estate, the ten children of John E. Leinweber were each the owner in fee of one-eleventh and the five children of Henry Leinweber each owned in fee one-fifty-fifth part of said premises; that the children of the complainants had no interest in the premises and their claims constituted a cloud on the title which should be removed, and they were perpetually enjoined from asserting any title to or interest therein. Partition was decreed subject to the rights of the widow of John E. Leinweber, and commis-

sioners were appointed for that purpose. The widow by a written instrument waived and released her life estate and consented to the sale of the land freed therefrom, electing to take the value of her life estate in money. The minor children of complainants, by their guardian *ad litem*, have sued out a writ of error and bring the record to this court for review.

The controverted question raised is whether the deed "to the children and their descendants of the said John E. Leinweber" created vested or contingent remainders. The plaintiffs in error contend the remainders were contingent; that the language of the deed plainly indicates that it was the intention of the grantor to postpone the remainders vesting in interest until the termination of the life estate. Defendants in error contend that the deed granted to the children of John E. Leinweber living at the time of the execution, vested interests in remainder, subject to reduction *pro tanto* by the birth of other children, and subject, further, to defeasance in case of the death, during the lifetime of John E. Leinweber, of the owner or owners of such remainders leaving descendants surviving, in which event the descendants of the owner so dying would take the deceased parent's share by way of shifting use. Plaintiffs in error insist the grant to the "children and their descendants" was not to one but to both, and argue that as at the date of the grant part of the children were in being but their descendants were not, it could not be known at that time who would become the owners of the estate in remainder.

Courts will construe "and" as "or," and the converse, where necessary to give effect to the intention. (*Manning v. Manning*, 229 Mass. 527; *Maguire v. Moore*, 108 Mo. 267.) The grant was by deed, and the words "and their descendants" are to be construed as words of purchase. (2 Fearn on Remainders, sec. 508; 2 Jarman on Wills,—5th Am. ed.—33; 2 Washburn on Real Prop.—4th ed.—

604.) The words "and their descendants" being words of purchase, it was possible for the descendants of the children of John E. Leinweber to take concurrently with their parents or in succession to their parents or in substitution for deceased parents. Unless the instrument creating the estate indicates a contrary intention, the weight of authority appears to be that in a grant to several and their descendants, the descendants would take by way of substitution, only, and not in competition with their parents living at the time of distribution. (Theobald on Wills,—7th ed.—322; 28 Halsbury's Laws of England, sec. 1375; 30 Am. & Eng. Ency. of Law, 729; 3 Jarman on Wills,—5th Am. ed.—387-390; *Pearson v. Stephen*, 2 D. & Cl. 328; 5 Bli. (N. S.) 203; *Manning v. Mannig*, *supra*.) There is nothing in the language of the deed to indicate that it was not the purpose and intention that the descendants of the children of the life tenant were not to take in substitution but were to take concurrently or in succession. If they were to take in substitution, then the remainders vested in the children of John E. Leinweber in being at the time the deed was made, subject to reduction on the birth of another child, and further subject to defeasance by the death, during the lifetime of John E. Leinweber, of any remainderman leaving descendants, in which event the descendants would take their deceased ancestor's share. Upon the death of John E. Leinweber the class to take in remainder was fixed and determined, and was composed of his ten living children and the five descendants of his deceased son. The ten children were then indefeasibly vested each with the undivided one-eleventh and the children of the deceased son each with the undivided one-fifty-fifth, subject to the life estate of the widow.

Plaintiffs in error rely on *Bates v. Gillett*, 132 Ill. 287, as supporting their contention. That case involved the construction of a will, and it was held the remainders created by it were contingent. The court said it clearly appeared

from the language of the will that the testator intended the remainders to vest in interest in such issue of the life tenant as should be in being when the estate vested in possession. In *Knight v. Pottgieser*, 176 Ill. 368, the court construed a will in which the testator made a devise to his wife for life and directed that at her death the property should "be divided amongst my children and their descendants in equal shares, the descendant or descendants of a deceased child to take the parent's share in equal proportions." The testator left surviving a widow, one son and three daughters. The son died intestate, leaving a widow but no children or descendants of children. The widow of the deceased son filed a bill for partition, claiming her husband was seized of a vested remainder in the premises and that upon his death she inherited the undivided one-half thereof. The circuit court sustained that construction of the will and granted the relief prayed, and this court affirmed the decree of the circuit court. The decision in that case appears to be directly in point and to sustain the construction of the deed in this case by the circuit court. In that case the court referred to the rule that the law favors a construction that will vest remainders unless a contrary intention is indicated by clear words. The court also held that the direction to pay or distribute *in futuro* was not for reasons personal to the legatee, but merely because the testator desired to appropriate the property to the use of another during the life of such other, and that the remainder vested in interest, the right of enjoyment only being postponed.

We are of opinion the decree of the circuit court was correct, and it is affirmed.

Decree affirmed.

(No. 12611.—Judgment affirmed.)

DAVID M. RUBIN *et al.* Appellees, *vs.* ERIK P. STRANDBERG, JR., Appellant.

Opinion filed April 15, 1919.

1. MINORS—*a minor may disaffirm or ratify contract within a reasonable time after attaining his majority.* Within a reasonable time after attaining his majority a minor may disaffirm a contract made by him during minority or he may by acts recognizing the contract after becoming of age ratify it.

2. SAME—*minor cannot defeat ratification of contract by alleging ignorance of right to disaffirm.* Where a minor enters into a contract for the purchase of land his acts in making payments under the contract and having it recorded after he has become of age will ratify the contract, and as he is presumed to know the law he cannot afterwards be heard to say that he performed the acts of ratification in ignorance of his right to disaffirm.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

JOEL C. CARLSON, for appellant.

H. J. ROSENBERG, and LOUIS BECKER, (IRVING ZIMMERMAN, of counsel,) for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

David M. Rubin, Ike Rubin and Jacob L. Rubin, partners engaged in the real estate business in Chicago, filed their bill in the superior court of Cook county to annul and remove as a cloud upon title to certain lands described, a contract between complainants and Erik P. Strandberg, Jr., and in the alternative that Strandberg be required to pay the amount due under said contract, and that upon making such payments the contract be re-instated and declared in full force and effect, and for other relief. Strandberg answered the bill and filed a cross-bill. After answers and replications the cause was heard in open court and a decree entered denying the relief prayed in the original bill

and dismissing the same and granting the relief prayed in the cross-bill. On appeal to the Appellate Court for the First District that court reversed the decree of the superior court and remanded the cause, with directions to dismiss the cross-bill and to grant the prayer of the original bill. The Appellate Court granted a certificate of importance, and Strandberg (hereafter referred to as defendant) has prosecuted a further appeal to this court.

The facts out of which this litigation arises are as follows: On the 4th of March, 1915, the Rubins (hereafter referred to as complainants) entered into a contract with defendant by which the former agreed to sell, and the latter to purchase, certain lots described in the contract, situated in the city of Chicago, for the sum of \$6600, to be paid for as follows: \$1000 in cash on the date of signing the contract, the balance in monthly installments of \$150 each, payable the fourth day of each month until the balance was paid, with interest at six per cent per annum on the sum remaining unpaid from time to time. The contract provided that in case of the failure of defendant to make either of the payments, the contract should, at the option of complainants, be forfeited and defendant should forfeit all payments made by him and they should be retained by complainants in liquidation of damages sustained by them, and they should have the right to re-enter and take possession of the premises. The \$1000 cash payment appears to have been made, also the further payments, with interest from the date of the contract up to and including the payment December 4, 1915. The aggregate amount paid, including interest, was \$2575. At the time the contract was entered into defendant was a minor. He attained his majority October 7, 1915. The payments made in November and December were made after he was of age. No payment was made in January or February, 1916, but on the 4th of February defendant, accompanied by his counsel, tendered back to complainants the contract for the purchase

of the property, together with a quit-claim deed conveying all defendant's interest therein to complainants, and at the same time he demanded that complainants pay back to him the money which he had paid them under the contract, for the reason that he was a minor under twenty-one years of age when the contract was entered into, and also because he claimed complainants had misrepresented to him the property. Complainants refused to pay the money back or receive the quit-claim deed and contract, and shortly thereafter filed their bill alleging defendant had made all payments according to the terms of the contract up to and including the payment due December 4, 1915, together with interest, which payments had been duly credited on the contract, and that he had defaulted in the payments due January 4 and February 4, 1916, respectively, but had caused the contract to be recorded in the recorder's office January 3, 1916. Defendant answered the bill, alleging his minority when the contract was entered into; that he did not learn of his right to disaffirm the contract until February 1, 1916, at which time he was informed by his solicitor that he had a right, under the law, to disaffirm the contract, and that he thereupon elected to disaffirm it and tendered complainants said contract and the quit-claim deed for the property and demanded a return of his money paid under the contract. The answer also charged complainants with fraud and misrepresentation in inducing defendant to enter into the contract. Defendant also filed a cross-bill setting forth substantially the same matters alleged in his answer. As above stated, on the hearing the court denied the relief prayed in the original bill and granted the relief prayed under the cross-bill, which decree was reversed by the Appellate Court and the cause remanded, with directions to the court to dismiss the cross-bill and grant the relief prayed in the original bill.

It is not disputed that defendant was a minor when the contract was entered into and that he attained his majority

October 7, 1915, but complainants contend that the payments made by defendant after he became of age, and his act in causing the contract to be recorded in January, 1916, constituted a ratification of the contract after he attained his majority. The defendant's answer to this contention is that at the time these acts were performed he did not know he had the legal right to disaffirm the contract upon attaining his majority, and that before said acts can be held to be a ratification of the contract it is necessary that the defendant should have known, at the time of their performance, that he had a right to disaffirm the contract on the ground that it was entered into during his minority.

There was a failure of the proof to sustain the allegations of the answer and cross-bill of defendant that he was induced to enter into the contract by fraud and misrepresentation, and his right to disaffirm the contract rested alone upon whether he had ratified it after becoming of age. A minor may disaffirm a contract made by him during minority within a reasonable time after attaining his majority, and he may by acts recognizing the contract after becoming of age ratify it. There can be no doubt that the acts of the defendant after attaining his majority, in making the monthly payments and causing the contract to be recorded, were a ratification of the contract, unless the law is, as contended by defendant, that it was essential, in order to constitute said acts a ratification, that he knew at the time he performed the acts that the law authorized him to disaffirm the contract. Cases decided by this court relied on by defendant are *Davidson v. Young*, 38 Ill. 145, *Sayles v. Christie*, 187 id. 420, and *Coe v. Moon*, 260 id. 76. In none of those cases was the question of the knowledge of the party, at the time of the alleged ratification, that he had a right, under the law, to disaffirm, involved. In the *Davidson case* the court held the act or circumstance relied on as a ratification of a deed made while the grantor was a minor was not of a character to constitute a rati-

fication. The court said: "In order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences and with an express intent to ratify what is known to be voidable." Whether the grantor knew at the time of the alleged ratification that she had the legal right to disaffirm the deed is not mentioned or referred to. The case of *Sayles v. Christie, supra*, is the same in substance. In *Coe v. Moon, supra*, the grantor, after attaining his majority, sought to disaffirm and set aside a deed made by him while a minor. The deed he had made was to property in Eureka, Illinois, exchanged for farm land in Kansas. The grounds upon which he sought to disaffirm after becoming of age were that he had been defrauded by the party with whom he dealt in making the trade, both as to the value and location of the land in Kansas, and the proof sustained that charge. It was claimed in that case that the grantor had ratified the deed after attaining his majority, but the proof showed that at the time of the alleged acts of ratification he had no knowledge of the fraud on account of which he sought to disaffirm and did not acquire such knowledge until after said acts. The court said: "Where the same lack of knowledge exists at the time of the alleged ratification as existed at the time of the original contract or deed, in such case the ratification is held to be a part of the original transaction and to be ineffectual."

In none of the above cases was the question here under consideration involved. In this case the proof failed to show that defendant had been induced by fraud and misrepresentation to enter into the contract. He had no reason for disaffirming it except that he had changed his mind. His change of mind was not the result of any discovery of the truth of facts which had been fraudulently misrepresented to him by complainants and upon which he relied in making the contract. He simply concluded that he had

made an unprofitable contract and sought to disaffirm solely because he was a minor when it was made. Just when he reached that conclusion does not definitely appear. He defaulted in the January, 1916, payment, and on the day the February payment was due notified complainants of his election to disaffirm. He then would have had the legal right to disaffirm the contract if he had not previously and since attaining his majority ratified it. The payments in November and December, 1915, evidenced his intention to comply with his contract and were a ratification of it, unless, as contended, he did not then know the law authorized him to disaffirm it. In our opinion defendant's acts after becoming of age must be regarded as done in the light of knowledge of his legal right to disaffirm; that he was presumed to know the law, and cannot be heard to say that he was ignorant of his legal right in that respect and performed the alleged acts of ratification in ignorance of that right. Upon this particular question the authorities are not altogether in accord, but in our opinion the more logical reasoning sustains that proposition. Wharton on Contracts (vol. 1, sec. 57,) in discussing the question says: "Hence the better opinion is that a ratification made by a person of sound mind on arriving at his majority will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law." The proposition that it is not necessary to a binding ratification that the party sought to be charged knew at the time of the act that he had the legal right to avoid the contract is sustained in *American Mortgage Co. v. Wright*, 101 Ala. 658; *Bestor v. Hickey*, 71 Conn. 181; *Morse v. Wheeler*, 86 Mass. 570; *Anderson v. Soward*, 40 Ohio St. 325; *Clark v. VanCourt*, 100 Ind. 113; 14 R. C. L. 249.

In our opinion the Appellate Court did not err in holding defendant's acts after attaining his majority were a ratification of the contract, and its judgment is affirmed.

Judgment affirmed.

(No. 12401.—Judgment affirmed.)

THE PEOPLE *ex rel.* Orlin G. Holmes, County Collector,
Appellee, *vs.* THE CLEVELAND, CINCINNATI, CHICAGO
AND ST. LOUIS RAILWAY COMPANY, Appellant.

Opinion filed April 15, 1919.

1. TAXES—*when questions cannot be considered on an appeal from a judgment for taxes.* On an appeal from a judgment for taxes, questions raised by the property owner not based upon any facts disclosed in the record nor upon the specific objections to the validity of the taxes objected to, cannot be considered by the Supreme Court.

2. SCHOOLS—*purpose of sections 93 to 96 of the School law as amended in 1917, for the organization of a non-high-school district.* The purpose of sections 93 to 96, inclusive, of the School law as amended in 1917, providing for the organization of non-high-school districts, is to give all pupils in the non-high-school districts the privileges of a high school education of a four-year course, whether they live in districts having no high school or having only a two or three-year high school.

3. SAME—*under section 96 of School law as amended in 1917 any high school pupil may attend school in most convenient district.* Under section 96 of the School law as amended in 1917, high school pupils in township high-school districts, community high-school districts and in local high-school districts maintaining a recognized four-year high school have the same privilege of attending other high schools more convenient to them than those in their own district as is given to pupils in non-high-school districts.

4. SAME—*non-high-school district boards exercise jurisdiction separate from other high school boards.* The particular powers and duties granted to non-high-school district boards of education by section 94 of the School law as amended in 1917, and which were formerly given to boards of education of high-school districts located in such non-high-school districts, are by necessary implication withdrawn from such boards of education, and the boards in the two districts do not, therefore, exercise jurisdiction over the same territory for the same purpose.

5. SAME—*no limitation is placed on legislature with reference to formation of school districts and their power to tax.* There is no constitutional limitation placed upon the legislature with reference to the formation of school districts or as to the agencies

the State shall adopt for providing for free schools, and the legislature may provide for the establishment of districts for different purposes, conferring upon the boards of education the power of taxation to the extent of the legislature's will.

6. SAME—sections 93 to 96, inclusive, of School law as amended in 1917 are not invalid. Sections 93 to 96, inclusive, of the School law as amended in 1917, referring to non-high-school districts, are not subject to the objection that they permit two taxing bodies to exercise jurisdiction over the same territory for the same purpose.

7. Other questions in this case are controlled by the decisions in *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 286 Ill. 414, and *People v. Chicago and Northwestern Railway Co.* 286 id. 384.

APPEAL from the County Court of Crawford county; the Hon. DUANE GAINES, Judge, presiding.

P. J. KOLB, and JONES & LOWE, (L. J. HACKNEY, and FRANK L. LITTLETON, of counsel,) for appellant.

Mr. CHIEF JUSTICE DUNCAN delivered the opinion of the court:

Judgment was rendered in the county court of Crawford county for the sum of \$201.01, the amount of a tax levied by the board of education of the non-high-school district in that county, including interest, penalties and costs, against the property of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, appellant, for the year 1917.

Appellant's objections to the tax were based on the ground that sections 93, 94 and 96 of "An act to establish and maintain a system of free schools," as amended by an act of the legislature of the State of Illinois approved June 22, 1917, are void. (Laws of 1917, pp. 741-744.) One of the several grounds urged by appellant against the validity of said sections of the School law is, that the territory embraced in the "so-called non-high-school district need not be, and in most instances cannot be, compact territory lying contiguous, but ordinarily must, of necessity, consist of the

isolated and less populous parts of the several counties," entirely separated from each other by territory of intervening high-school districts. No such an objection was made by appellant to the taxes, and it is not even shown or contended that the non-high-school district in question is composed of territory that is not contiguous and compact. The contention of appellant in this regard, not being based upon any facts disclosed in the record or upon such specific objection to the validity of the taxes objected to, cannot be considered by this court.

Other specific objections made by the appellant to said taxes are, that said sections of the School law contravene and violate the provisions of the constitution of Illinois, particularly section 2 of article 2, section 22 of article 4 and sections 9 and 10 of article 9 thereof. The same objections were made by appellant in the case of *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 286 Ill. 414, and were decided by this court in that case against appellant for the reasons given in the case of *People v. Chicago and Northwestern Railway Co.* 286 Ill. 384. Those cases are conclusive in this case, and for the same reasons appellant's objections are overruled.

The final objection to the validity of sections 93 and 96 made by appellant is, that all territory not included in a high-school district maintaining a recognized four-year high school is included in the non-high-school districts, and pupils from any part of the non-high-school districts, including the local districts embraced therein that conduct a two or three-year high school, may attend any recognized two, three or four-year high school. It is urged that these provisions compel tax-payers who reside in a local district included in a non-high-school district to contribute, without their consent, to the support of other high schools maintaining only a two or three-year course, thus permitting two taxing bodies to exercise jurisdiction over the same territory for the same purpose.

The material part of section 93 in the consideration of this objection provides thus: "In each county of the State, all the territory of the county not included in a township high-school district, or a community high-school district, or a district maintaining a recognized four-year high school, shall be organized into a non-high-school district for the purpose of levying a tax to pay the tuition of all eighth grade graduates residing in such non-high-school district, including pupils attending a recognized two or three-year high school conducted by a local school district. * * * None of the provisions of this act regarding the establishment of non-high-school districts shall be construed to prevent the organization of any territory of such non-high-school districts, into township or community high school, school districts."

By section 94 the board of education of a non-high-school district is given the following powers and duties: (1) To levy a tax, annually, upon all the taxable property of such non-high-school district, not to exceed one per cent upon the valuation, to be ascertained by the last assessment for State and county purposes, for the purpose of paying the tuition of all eighth grade graduates residing within such non-high-school district attending any two, three or four-year recognized high school; (2) to issue orders on the county treasurer, payable out of any funds belonging to said non-high-school district, on or before the first Tuesday of May of each year, for the payment of the tuition of eighth grade graduates residing within such non-high-school district attending a recognized high school, provided such attendance shall be certified to said board by the board of education of the high school attended; (3) to make such reports as may be required by the State Superintendent of Public Instruction and by the county superintendent of schools; and (4) to pay election expenses and other necessary incidental expenses out of the funds of the non-high-school district.

Section 95 designates who shall be selected as treasurer of the non-high-school district and prescribes his duties. Section 96 provides as follows:

"Upon the approval of the county superintendent of schools any high school pupil may attend a recognized high school more convenient in some district other than the high-school district in which he resides and the board of education of the high-school district in which said pupil resides shall pay the tuition of such pupil, provided, said tuition shall not exceed the *per capita* cost of maintaining the high school attended. Any eighth grade graduate residing in a non-high-school district may attend any recognized two, three or four-year high school, and his tuition shall be paid by the board of education of the non-high-school district in which he resides.

"An eighth grade graduate in the meaning of this act is any person of school age who gives satisfactory evidence of having completed the first eight grades of school work by presenting a certificate of promotion issued by the home school board, or by passing an examination given by the county superintendent of schools or by passing an examination given by the school attended.

"A recognized high school in the meaning of this act is any public high school providing a course of two or more years of work approved by the Superintendent of Public Instruction.

"The tuition paid shall in no case exceed the *per capita* cost of maintaining the high school attended, excluding therefrom interest paid on bonded indebtedness which shall be computed by dividing the total cost of conducting and maintaining said high school by the average number of pupils enrolled, including tuition pupils."

Section 89 of the act entitled "An act to establish and maintain a system of free schools," approved and in force June 12, 1909, as subsequently amended, is the act which enables local school districts to establish and maintain high

schools, and it provides as follows: "Any school district having a population of two thousand (2000) inhabitants or more may, in the manner herein provided for establishing and maintaining a township high school, establish and maintain a high school for the benefit of the inhabitants of such school district, and elect a board of education therefor with the same powers conferred on township high school boards of education. The territory of such district when so organized for high school purposes shall constitute a high-school district for high school purposes distinct and separate from the common school district having the same boundaries, and the high school board of education of such high-school district shall have the same power to levy taxes and establish and maintain high schools as township high school boards of education organized under this act possess, and such taxes shall be in addition to the taxes authorized to be levied by section 189 of this act. All school districts which have heretofore organized under this section, elected a high school board of education, and are maintaining a high school, shall be regarded as high-school districts distinct and separate from the common school district having the same boundaries, and the high school board of education of such high-school district shall have the same power of taxation as township high school boards of education organized under this act."

The evident purpose of sections 93 to 96, inclusive, is to give all eighth grade graduates in the non-high-school districts the privileges of a high school education in a four-year course. In obtaining this education a pupil has the privilege of attending any recognized two, three or four-year high school. This gives him the option of attending a recognized high school of a two-year course if that should be more convenient to him, and at the end of two years of attending some recognized three-year high school for such time as he may complete a three-year high school course, and then finally of attending a recognized four-year

high school until he becomes a graduate of that four-year high school. His tuition is to be paid in all such high schools that he may attend by the non-high-school board of education of his district. All high school pupils of any recognized high school in a local district included in the non-high-school district are given the same privileges of a high school education in a recognized four-year high school, and for this purpose they have the privilege of attending their own high school until they have completed the two or three-year high school course in that high school, and then of finishing their education by attending any other high school until they have completed a four-year high school course, provided they have obtained the approval of the county superintendent of schools, as provided in section 96. It is further apparent by the provisions of said section that high school pupils in township high-school districts, community high-school districts, and in local high-school districts maintaining a recognized four-year high school, have the same privilege of attending high schools in districts more convenient to them than their own high-school district and upon the same terms provided in section 96.

All the powers and duties granted to boards of education of non-high-school districts are enumerated in section 94, and the sum and substance of their powers and duties in their districts is to levy taxes for the purpose of paying the tuition of all eighth grade graduates attending recognized high schools, and all election expenses and other necessary incidental expenses, out of said taxes, and paying said high school tuition and expenses and the making of reports to the State superintendent and the county superintendent. These powers and duties granted to the non-high-school boards, or such of them as were given to boards of education of high-school districts located in such non-high-school districts, are also by necessary implication withdrawn or taken from such high school boards of education.

Therefore there is no clash between the powers and duties of the boards of education of the non-high-school districts and the boards of education of such high-school districts as are located in the non-high-school districts. So far as these two boards are concerned, it cannot be said that they are two bodies exercising jurisdiction over the same territory for the same purpose. The creation of the township high school boards for said purposes amounts to nothing more than a division or re-distribution of existing powers under the School law. (*Russell v. High School Board*, 212 Ill. 327.) It is evident that in the discharge of its powers and duties the board of education of the non-high-school district does not conflict with any other board or authority in the discharge of its duties.

It is clearly apparent from said sections that the high school boards in the non-high-school districts are authorized to levy taxes and pay the tuition of all eighth grade graduates in the non-high-school districts, including the local school districts therein conducting two or three-year high schools, and to pay such tuition to any and all high school boards conducting approved high schools which such eighth grade pupils may elect to attend. This is made apparent (1) in section 93, which declares that the non-high-school districts are organized "for the purpose of levying a tax to pay the tuition of all eighth grade graduates residing in such non-high-school district, including pupils attending a recognized two or three-year high school conducted by a local school district;" (2) by the provisions of section 94, which provide that the levy of the annual tax in the non-high-school district is "for the purpose of paying the tuition of all eighth grade graduates residing within such non-high-school district, attending any two, three or four-year recognized high school;" (3) by the further provisions of section 94 that such non-high-school boards shall issue orders "for the payment of the tuition of eighth grade graduates residing within such non-high-school district at-

tending a recognized high school;" and (4) by the provisions of section 96 providing that "any eighth grade graduate residing in a non-high-school district may attend any recognized two, three or four-year high school, and his tuition shall be paid by the board of education of the non-high-school district in which he resides." It is contemplated, also, by these sections that any local school district conducting a two or three-year high school will so conduct it that it will be a high school approved by the Superintendent of Public Instruction, as provided by section 96. As every board of a non-high-school district is authorized to pay the tuition of all eighth grade graduates attending any approved high school which they may attend, if any such non-high-school district has one or more local districts conducting approved high schools the non-high-school board is authorized to pay the tuition to such high schools of all eighth grade graduates attending those schools, including those eighth grade graduates attending the high school in their own high-school district. If such non-high-school district has also local school districts that do not conduct high schools, it is clear that all the school boards may exercise their powers and duties in their several school districts without any clash in their powers and duties. The local school district conducting no high school simply exercises all the powers and duties given to it under the School law before the sections in question were enacted. In the local school districts conducting two or three-year approved high schools the school directors will exercise the powers and duties, in the common school district of the same boundaries, that were given to them under the School law before the enactment of said sections, and the high school boards of education in such school districts will exercise the same powers and duties granted to them under section 89, except that part of their powers and duties that is withdrawn from them and lodged in the non-high-

school board of education under said sections now in question. This interpretation makes it clear that sections 93 to 96, inclusive, are not subject to the objection that they permit two taxing bodies to exercise jurisdiction over the same territory for the same purpose. Such an interpretation is reasonable, and if for any reason the meaning of said sections is doubtful, the doubt must be resolved in favor of the validity of the act of the General Assembly. *Wilson v. Board of Trustees*, 133 Ill. 443.

The provisions of said section 96 that upon the approval of the county superintendent of schools any high school pupil may attend a recognized high school more convenient in some district other than the high school district in which he resides and the board of education of the high-school district in which said pupil resides shall pay the tuition of such pupil, cannot have the effect to invalidate any of the provisions of said sections or to change the interpretation already placed upon them. This provision is simply made for the convenience of all high school pupils, and it applies alike to all high schools having an approved high school course. There is no constitutional limitation placed upon the legislature with reference to the formation of school districts or as to the agencies the State shall adopt for providing for free schools. It is entirely competent for the legislature to provide for the establishment of township high schools as well as school districts, and to confer upon each of said boards the power of taxation to the extent of the legislature's will. *People v. Chicago and Illinois Midland Railway Co.* 256 Ill. 488.

The judgment of the county court is affirmed.

Judgment affirmed.

(No. 12347.—Reversed and remanded.)

ELMER N. LEWARK, Appellee, *vs.* CHARLES DODD *et al.*
Appellants.

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. *WILLS—descent of property, whether by inheritance or devise, is controlled by statute.* The descent of property, whether by inheritance or devise, is controlled by statute, and the right to make a will and the right to take property under a will exist only by virtue of the statutes.

2. *SAME—right to contest a will is statutory.* The right to contest a will by a bill in chancery is purely statutory and can be exercised only in the manner and within the limitations prescribed by the statute.

3. *SAME—proviso to section 7 of Wills act is not a statute of limitation.* The proviso to section 7 of the Statute of Wills, as to the right of parties interested to contest a will within one year from its probate, is not a statute of limitation but is one conferring jurisdiction.

4. *SAME—after one year from probate will can be set aside only as to interests of persons under disability.* Under the proviso to section 7 of the Wills act, where a suit to contest a will is brought more than one year after probate by parties who were minors at the time of the probate, the will may be set aside as to the interests of the contesting heirs who were under disability, but it is forever binding and conclusive on all the parties not under disability at the time of probate who did not contest the will within one year thereafter.

5. *PRACTICE—court sitting in chancery may make up issue at law and call a jury to try it.* Under the system of combining common law and chancery jurisdiction in the same court at the same time, a judge in the exercise of chancery jurisdiction may make up an issue at law and call a jury to try it; and this fact has made some of the rules which prevailed under the system of separate courts of chancery and common law unnecessary and in practice they are disregarded.

6. *SAME—when objection to manner in which issue at law in a will contest case is submitted is waived on appeal.* Where no objection is made in a will contest case to the manner in which the chancellor has submitted the issue at law as to the validity of the will to the jury and the decree recites the proper submission of the issue and the return of a verdict thereon, any objection as to the form of the issue is waived in the Supreme Court.

APPEAL from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

ALBERT PETERSON, and WILLIAM E. CLOYES, for appellants.

FRANK B. MURRAY, ALANSON C. NOBLE, and RALPH F. POTTER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee, Elmer N. Lewark, a minor, in June, 1917, filed a bill by his next friend in the circuit court of Cook county to contest the will of Lula G. Knorr upon the ground of the insanity of the testatrix and the undue influence of the sole devisee with reference to the same. Upon the trial of the issue in the circuit court the jury returned a verdict finding that the instrument in question was not the last will and testament of Lula G. Knorr, and the court rendered a decree adjudging the will, and the probate thereof, void. This appeal followed.

Lula G. Knorr executed the instrument here in question on September 20, 1913, leaving all of her property to Mary E. Dodd, the wife of Charles Dodd, neither of them being related in any way to her. The testatrix died October 21, 1913. She left no surviving husband, and her heirs were her mother, Mary E. Knox, and Elmer N. Lewark, the appellee, and his sister, who were her nephew and niece. The will was admitted to probate January 8, 1914. On January 7, 1915, Mrs. Knox and the appellee and his sister (both the latter then being minors, by Mrs. Knox, their next friend,) filed a bill to contest the will, which was afterwards dismissed for want of prosecution. The bill on which the decree here in question was entered was filed June 1, 1917. Appellants do not question the verdict, but they insist that the court erred in decreeing the will to be void in its entirety instead of limiting the effect of the

decree to the interest of the appellee, and that no issue of law was properly made up as to whether the writing produced was the last will and testament of the testatrix.

In this State the descent of property, whether by inheritance or devise, is controlled by statute. The right to make a will and the right to take property under a will exist only by virtue of the statutes of this State and are entirely subject to their provisions. (*In re Estate of Graves*, 242 Ill. 212; *Kochersperger v. Drake*, 167 id. 122.) The right to contest a will by a bill in chancery is purely statutory and can be exercised only in the manner and within the limitations prescribed by the statute. (*Selden v. Illinois Trust and Savings Bank*, 239 Ill. 67; *Storrs v. St. Luke's Hospital*, 180 id. 368; *Spaulding v. White*, 173 id. 127.) The provision for the contest of wills is found in the proviso to section 7 of the Statute of Wills, as follows: "*Provided, however, that if any person interested shall, within one year after the probate of any such will, testament or codicil in the county court as aforesaid, appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or non compos mentis the like period after the removal of their respective disabilities.*" (Hurd's Stat. 1917, p. 2967.) This proviso is not a statute of limitations but is one conferring jurisdiction. *Sinnet v. Bowman*, 151 Ill. 146; *Spaulding v. White, supra*; *Carlin v. Peerless Gas Light Co.* 283 Ill. 142.

The question first presented here is, whether by the proviso to said section 7 as to contesting wills the court

is given the right to entirely set aside the will at the suit of one within the saving clause after the year has passed, so as to wholly destroy the interests of all the beneficiaries named by the instrument, or only to set it aside as it affects the interests of the heir who was an infant or *non compos mentis* at the time the will was probated, and who filed such contest before the expiration of a year after becoming of age or becoming sane, as the case may be.

This court in *Dibble v. Winter*, 247 Ill. 243, discussed at some length the history of our statute on wills and the sources from which its various provisions were derived, stating that section 7, as to the contest of wills, was taken, in substance, in 1829 from the statute of Kentucky, and that the Kentucky statute was taken, in turn, from the Virginia statute. It is stated in that opinion, also, that under the common law there could be a contest of the will every time it was offered in evidence. The earliest Virginia statute (1748) referred to in that case provided for the probate of wills upon due notice and contained no provision as to contests by persons under no disability, but provided that a contest by those under certain disabilities, such as being under age or *non compos mentis*, must be brought within ten years after their several disabilities and incapacities were removed. The later Virginia statute (1785) provided that any contest must be brought within seven years after the probate, whether brought by one under legal disability or not. The Illinois statute of 1829 provided that those under disabilities must bring the contest, if at all, within five years after their disability was removed. The statutes of Virginia and Kentucky with reference to will contests are very similar to the statute of this State.

It will thus be seen that the tendency has constantly been to shorten the time within which the contest can be brought and to narrow the classes of people for whose benefit the time is extended. Now the statute of this State provides that the contest must be brought within a year after

the disabilities are removed, the last amendment in 1903 changing the limitation from three years to one. Under the authorities already cited there can be no question that the legislature could, in terms, fix the time of contest as to all parties in any manner that it desired. In view of the history of legislation on this subject, did it intend, when it passed the proviso to section 7 as it now reads, to make the probate of the will binding and conclusive on all parties except infants and persons *non compos mentis* unless a contest was begun by one or more of the parties not under disability within one year after the probate of the will? This question has never been passed upon by this court, but under practically similar statutory provisions as to contesting wills the Supreme Courts of California and Montana have held that such a statute was conclusive as to all those under no disabilities if the contest was not begun within the time so limited. (*Samson v. Samson*, 64 Cal. 327; *Spencer v. Spencer*, 31 Mont. 631.) *Stead v. Curtis*, 205 Fed. Rep. 439, is in accord with the same conclusion. It has also been held that where one co-heir or tenant in common is under disability, his co-heirs or co-tenants who are not under disability will still be barred by the Statute of Limitations even though the statute saves the right of the co-tenant under disability. (*Roe v. Rowlston*, 2 Taunt. 441; *Stovall v. Carmichael*, 52 Tex. 383; *Belote v. White*, 2 Head, 703.) On the other hand, the reasoning of the courts in *Powell v. Koehler*, 52 Ohio St. 103, *Wells v. Wells*, 144 Mo. 198, and *Croker v. Williamson*, 208 N. Y. 480, would tend to the opposite conclusion. We agree, however, with counsel for appellants that some of the decisions last cited did not have the identical question raised that is raised here. In any event, none of the decisions in other jurisdictions are necessarily controlling here, and at the most they are only persuasive.

It is argued with earnestness by counsel for appellee that it is unreasonable to construe the statute so that a

will can be valid as to certain of the heirs or parties and invalid as to others; that the will should be annulled in its entirety or not at all. We see no difficulty, however, in voiding the probate so far as concerns the interest of the contesting heirs then or formerly under disability and permitting it to stand so far as it concerns the heirs who have lost their rights by lapse of time. It is purely a question of what the legislature intended. One of the great objects of the law is to quiet the title to property and render it certain. If section 7 is to be construed as contended for by counsel for the appellants, there would be a chance that twenty years or more after a will was probated the whole title under which the beneficiaries claimed might be overthrown and the property given to the heirs. This would render it very difficult, if not impossible, to dispose of the property or improve it to any considerable extent during all that time. It is the policy of the law to limit uncertainties, such as the one here under consideration, as much as is commensurate with other rights which the law cannot overlook. It is clear the policy of the law has been for many years in this country, and especially in this State since 1829, to limit the time in which will contests could be brought. It would be absolutely contrary to the trend of public policy in this regard to construe this statute as holding that the rights of the beneficiaries, not only with respect to those heirs who are under disability but also with respect to those under no disability, shall remain unsettled until such time as the disabilities of all the heirs are removed. In our judgment a fair construction of the statute, in the light of the history of legislation upon this subject, is that after the year the probate is, as the proviso says, forever binding and conclusive on all the parties concerned, except infants and persons *non compos mentis*. The circuit court erroneously held otherwise.

It is also urged by counsel for appellants that the final decree is wrong because the record shows that no issue of

law was properly made up as to whether the writing produced was the last will and testament of the testatrix. The decree recites: "The court having heretofore directed an issue at law to be made up whether the writing referred to in the pleadings and purporting to be the last will and testament of Lula G. Knorr, deceased, was the last will and testament of the said Lula G. Knorr or not, and a jury * * * having been duly called, selected and sworn to try the said issue, * * * and the jury having found by their verdict that the said writing was not the last will and testament of said Lula G. Knorr, deceased," etc. In a system of practice where the common law and equity courts were entirely separate and their jurisdiction was exercised by different judges, an issue to be tried at law was certified by the chancery court to the common law court, and after the trial the verdict was certified by the common law court back to the chancery court. Under our system the same judge exercises both common law and chancery jurisdiction in the same court at the same time, and he may make the issue at law and immediately call a jury to try it. This practice has made it unnecessary in our courts to follow some of the rules which prevailed under the system of separate courts of chancery and common law jurisdiction, and in practice some of such rules are disregarded. (*Williams v. Bishop*, 15 Ill. 553; *Milk v. Moore*, 39 id. 584.) The usual method of submitting the issue to be tried by a jury in a case of this character is in the form of questions made up by the court, or by the parties under the direction of the court, framed so as to require merely an affirmative or negative answer. Whether or not that was done in this case the record does not set out at length. The recital in the decree is that it was done and that the issue was submitted to the jury, and the verdict so returned by the jury upon that issue must be taken as showing that it was done. There seems to have been no objection made in the circuit court as to the manner in

which this question was submitted. Therefore any objection to the manner in which it was submitted must be regarded as waived.

The decree of the circuit court will be reversed and the cause remanded, with directions to enter a decree in accordance with the views herein expressed, holding the will to be void but limiting the effect of the decree only as to the interest of the minor heir of Lula G. Knorr, deceased, who by his next friend brought this contest.

Reversed and remanded, with directions.

(No. 12539.—Judgment affirmed.)

EUDOKIA JAKUB, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(J. SANDROVITZ & Co. Defendant in Error.)

Opinion filed April 15, 1919.

1. WORKMEN'S COMPENSATION—*circuit court may review decision of arbitrator although no application is made for review by commission.* Where the decision of the arbitrator has become the decision of the Industrial Commission because no application is made for review before the commission, the circuit court has jurisdiction to review the record of the proceeding before the arbitrator by writ of *certiorari*.

2. SAME—*accidental injury necessary before compensation can be awarded for death of an employee having pre-existing disease.* Compensation may be awarded for the death of an employee although he was afflicted with a pre-existing disease, provided the disease was aggravated and accelerated by an accidental injury received in the course of the employment, but to bring the case within the rule there must have been an accidental injury as the immediate or proximate cause of death.

3. SAME—*when death is not from accidental injury.* An injury is said to be accidental which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee, but the mere fact that the death of an employee afflicted with heart trouble may have been hastened by the heavy character of his regular work does not show accidental injury.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

ISAAC LANDSBERG, for plaintiff in error.

TRUMAN HENRY MINER, (ALFRED ROY HULBERT, of counsel,) for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Plaintiff in error, Eudokia Jakub, applied to the Industrial Commission for compensation for the death of her husband, John Jakub, while in the employment of defendant in error, J. Sandrovitz & Co. An arbitrator found that Jakub did not sustain accidental injuries arising out of and in the course of his employment and denied the application. The decision of the arbitrator was filed with the Industrial Commission and became final as the decision of the commission. Plaintiff in error sued out a writ of *certiorari* from the circuit court of Cook county, and a return being made by the commission, the court confirmed the finding and certified that the case was one proper to be reviewed by this court.

There was no application for a review by the Industrial Commission of the decision of the arbitrator, and the question is presented whether the circuit court had jurisdiction to review the decision. Section 19 of the Workmen's Compensation act provides that the decision of the arbitrator shall be filed with the Industrial Commission, which shall send to each party a copy of the decision, and unless a petition for review is filed by either party within fifteen days after the receipt by said party of a copy of the decision, then the decision shall become the decision of the Industrial Commission; that the decision of the Industrial Commission acting within its powers, and of the arbitrator or committee of arbitration where no review is had and

his or their decision becomes the decision of the Industrial Commission, shall, in the absence of fraud, be conclusive unless reviewed as therein provided. The provision for such review is that the circuit court of the county where any of the parties defendant may be found shall, by writ of *certiorari* to the Industrial Commission, have power to review all questions of law presented by the record. Plaintiff in error did not avail herself of the statutory right to a review of the decision by the Industrial Commission and the privilege of introducing additional evidence upon such review, but permitted the decision of the arbitrator to become final as the decision of the Industrial Commission. By the statute the circuit court was given jurisdiction to review the record by *certiorari* without the necessity of a review of the decision of the arbitrator by the commission.

On the hearing before the arbitrator plaintiff in error proved the following facts: John Jakub was employed by defendant in error in baling loose pieces of copper in large bales weighing from 900 to 1500 pounds, by an electric baling press. He would put rags in the bottom of the press and then put on the scrap copper and press it down and repeat the process until there was enough for a bale, and would then release the power, open the press, bind the bale with wire and take it off the press upon a truck and haul it away. The last that was known of him before his death he was heard to call for more copper to put in the press. Very soon afterward he was found lying on the floor, with the bale, completed and wired, also on the floor, about two feet from him. He was still breathing and died within a half hour. These facts being proved, defendant in error introduced the verdict of a coroner's jury, which was admitted without objection, and found that the deceased came to his death "from organic heart disease (marked chronic fibrous myocarditis) and kidney disease." In rebuttal the plaintiff in error offered the testimony of a physician, who said that after the coroner's autopsy he examined the heart,

lungs, liver, kidneys, part of the intestines and the stomach, and found in them acute hyperemia and the heart somewhat enlarged; that in case of organic heart disease there was hyperemia in other organs, and the heavy exertion of the work in which he was employed would hasten his death. Another physician testified that in the condition of the deceased the effort and exertion of his work would interfere with the heart action and cause more or less trouble and finally cause death if the work was too heavy.

Compensation may be awarded although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of employment. This rule was applied in *Peoria Railway Terminal Co. v. Industrial Board*, 279 Ill. 352, where a fireman fell from the engine and suffered accidental injuries and a fracture of his skull. To bring a case within that rule, however, there must be an accidental injury as the immediate or proximate cause of death. The statute provides compensation for accidental injuries or death suffered in the course of the employment, and an injury to be accidental is one which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee. It is something which is unforeseen and not expected by the person to whom it happens. (*Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378.) In this case there was no evidence tending to prove any accident or accidental injury to the deceased. There was no mark upon his person and nothing from which it could be inferred that an accident had occurred, and it is not claimed that there was any accident but only that the heavy work which he was doing in the ordinary course of his employment caused or hastened his death. The decision of the arbitrator was therefore right and the circuit court did not err in confirming the decision.

The judgment is affirmed.

Judgment affirmed.

(No. 12617.—Reversed and remanded.)

EDWIN F. ABBOTT, Appellant, vs. WILLIAM T. CHURCH
et al. Appellees.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. WILLS—*evidence in the probate court tending to show who drew will is admissible in will contest on issue of undue influence.* Where a bill is filed to set aside a will on the sole ground that it was executed through undue influence of the chief beneficiary, the testimony of the attesting witnesses in the probate court tending to show the chief beneficiary drew the will is admissible where the evidence was not contradicted or objected to in the probate court.

2. SAME—*evidence that chief beneficiary drew will establishes prima facie proof of undue influence.* Where a will is contested on the ground of undue influence, evidence that the chief beneficiary drew the will establishes *prima facie* that the execution of the will was the result of undue influence exercised by that beneficiary, and, if unexplained, will justify a verdict against the will.

3. SAME—*when confidential or fiduciary relation arises.* Any relation existing between parties to a transaction wherein one of them is in duty bound to act with the utmost good faith for the benefit of the other is a confidential or fiduciary relation, and such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another.

4. SAME—*letters of testator are admissible only for purpose of sustaining will.* In a will contest case, letters of the testator are not admissible for the purpose of destroying or invalidating his will but may sometimes be admissible to sustain it.

5. EVIDENCE—*what is meant by word "think," when used by a witness.* The word "think" means "believe," and when a witness prefaces his testimony with "I think," he is to be taken as testifying to what he remembers.

APPEAL from the Superior Court of Cook county; the
Hon. DENIS E. SULLIVAN, Judge, presiding.

EDWIN F. ABBOTT, *pro se*, and C. HELMER JOHNSON,
for appellant.

JAMES H. WILKERSON, for appellees.

Mr. CHIEF JUSTICE DUNCAN delivered the opinion of the court:

This appeal is prosecuted by Edwin F. Abbott, complainant below in a bill to set aside the will of his brother, George B. Abbott, from a decree dismissing the bill and sustaining the will of the testator. The only ground upon which appellant relied in the court below and is relying on here is that the execution of the will was procured through the undue influence of Frank L. Shepard, who was made a beneficiary and one of the executors and trustees in the will.

The testator left property valued at approximately \$16,000. One thousand dollars of his property was personal property and the remainder was real estate. By his will he bequeathed to Frank L. Shepard all of his Sons of Veterans and Masonic badges, jewels, decorations and medals, all pictures, books, clothes, papers, jewelry, furniture and personal effects. The remainder of the estate, real, personal and mixed, he devised and bequeathed to his executors, William T. Church and Frank L. Shepard, with directions to convert the same into money within two years after his death. He then directed (1) that they pay to George Abbott Buckley the sum of \$500; (2) that they pay to his brother, Edwin F. Abbott, "one-fourth of the remainder of my said estate, less the sum of \$2000;" (3) that they then divide the residue into three equal parts, and that they pay one such part each to Mrs. Margaret Abbott Walker, William T. Church and Frank L. Shepard, and in case of the death of any one or more of said three persons, then in such case her, his or their share should pass to the heirs-at-law of such deceased person or persons. Neither executor was required to give any bond or security as executor. The will was executed April 8, 1911.

The bill alleged, in substance, that the testator at the time of making his will was ill and by reason of domestic troubles and of his illness was easily influenced; that the

will was prepared by William T. Church and Frank L. Shepard and under their advice and direction; that they were practicing law as partners in Chicago at the time the will was executed and were the legal and confidential advisers of the testator, and that they took advantage of the confidence he reposed in them and by undue influence procured the alleged will to be executed and whereby they were made the principal beneficiaries thereunder. All charges of undue influence were denied in the answer of appellees.

It is disclosed by the evidence that at the time the will of the testator was executed he was fifty-five years of age and was possessed of a sound mind and of a strong mentality. There is no evidence of his being in an enfeebled condition, either mentally or physically. Six years prior to the execution of his will he was divorced from his wife, but the record does not show that that incident affected him in any way whatever. He was a practicing physician, and in 1888 was elected commander-in-chief of the Sons of Veterans and served two years. He afterwards spent a few years in Honduras and returned to the United States in 1897. In 1898 Frank L. Shepard was elected commander-in-chief of the Sons of Veterans and the testator was made his national secretary. William T. Church was at this time commander of the Illinois Division of the Sons of Veterans. The three had offices in the Tacoma building, and being engaged in the same work in said organization their association ripened into very strong friendships, which continued until the death of the testator, June 14, 1917. In 1902 Shepard and Church became partners in the law firm of Barker, Church & Shepard. Church and Shepard became partners largely through the influence and persuasion of the testator, who thereafter had a desk in their office and used the office as it suited his convenience, received his mail there, kept an account with them and deposited with them his rents and sometimes his salary, and this account and deposit continued with them up to his death. They

rendered a great deal of service for him until the time of his death,—kept his accounts, took charge of his money, received his rents, took care of his property, superintended the re-building of his houses in 1914 and made contracts and paid the bills. Shepard was his attorney in 1905 in the divorce proceedings. One Haynes represented him in a suit in the United States court, Church and Shepard being therein consulted as friends but not as lawyers, as Church in his testimony put it. They helped him secure his bond in that suit. Shepard and Church represented him as attorneys in 1915 before the board of review. During a part of the time, in his absence from the State, they looked after all of his personal affairs, paid his lodge dues, insurance premiums, and kept his private papers in a tin box in their vault. His moneys received by them were deposited in the partnership account in a bank. Sometimes he had large sums thus deposited in their account, at other times it would all be checked out by the testator, but he drew checks whenever he wanted money, whether he had much, little or none left in his account, and all such checks were paid by them. There is no dispute in the evidence, most of it being given by Church, who was called as a witness for the appellant. Church testified that the first time he knew anything about the will or its contents was when it was opened after the death of Dr. Abbott, and that he had nothing to do whatever, by suggestion or otherwise, in its preparation.

On the introduction of the testimony taken in the probate court in the proceeding to probate the will, and which was offered by appellant, the appellees objected to the evidence contained in the following examination of the witness R. W. Lewis, one of the witnesses to the will, to-wit:

Q. "Where was this will executed?"

A. "In our office,—the office of Church, Shepard & Day. The firm then was Barker, Church & Shepard, at that time.

Q. "Who drew the will; do you know?"

A. "Well, I don't remember positively, but judging from the form of that certificate I think Frank L. Shepard.

Q. "You did not draw it?

A. "No, I don't think I did. I may have, but I think not."

The same character of evidence offered by appellant, found in the testimony of Anna L. Ekval before the probate court, was also objected to by appellees, the testimony objected to being the following:

Q. "Where was this will signed?

A. "Why, over at the attorney's office,—Church, Shepard & Day.

Q. "How did you happen to be in their office at the time?

A. "I am employed there.

Q. "Still employed there?

A. "Yes, sir.

Q. "How long had you known Mr. Abbott before this time?

A. "Oh, I had known him about fifteen years.

Q. "Do you know who drew this will?

A. "Why, I think Mr. Shepard,—Frank L. Shepard.

Q. "He is one of your employers?

A. "Yes."

The court sustained the objections of appellees aforesaid and struck out of the certificate of evidence all of said questions and answers of the attesting witnesses. There was no other testimony in the certificate of evidence before the probate court bearing upon the question as to where the will was signed and by whom it was prepared. These two witnesses were stenographers and employees of Church and Shepard at the time the will was drawn and executed, and Lewis was an attorney at law and in their employ at the time of the trial in the superior court. They were both called to testify on behalf of appellant. In his cross-examination Lewis testified that he did not remember whether or

not he did the mechanical part of typewriting the will but thought he did not; that he did not know positively who drew the will but based his answer in the probate court that Shepard drew the will, on the form of the certificate. Miss Ekval was not examined in the superior court touching the question as to where the will was drawn and executed and by whom prepared. There is no other evidence in the record on the question whether or not Shepard did prepare the will for the testator, except the evidence before the probate court and which was stricken from the certificate as aforesaid. The testimony of both attesting witnesses does show that the will was duly signed and properly witnessed and that they witnessed the signing of the will at the request of the deceased, and that they do not think Shepard was present when the will was so signed by the testator and attested. At the close of all the evidence the court excluded the evidence and directed the jury to return a verdict for the proponents of the will, appellees.

It is first contended by appellant that the court erred in striking from the certificate of the evidence before the probate court the questions and answers of the attesting witnesses, and in this contention he is right. This evidence was not further explained or contradicted in the probate court and no objection was made to it in the probate court. It was proper evidence and the certificate should have been admitted as a whole. (*Baker v. Baker*, 202 Ill. 595.) Had this evidence not been excluded, the positive testimony of Miss Ekval would have been in answer to a direct question who prepared the will, "I think Mr. Frank L. Shepard." Her answer was not further qualified or explained in the probate court, although when re-called as a witness in the superior court she did state that she did not positively know who did the work. Lewis' testimony was positive to the effect that Shepard drew the will, and he testified both in the probate court and in the superior court that he based his testimony upon the form of the attestation clause. The

attestation clause is substantially in the usual form, yet it contains language somewhat unusual and sufficient to characterize it. It reads thus: "The above instrument was subscribed by the said George B. Abbott in our presence and acknowledged by him to each of us, and he at the same time declared the above instrument so subscribed to be his last will and testament; and we, at his request, have signed our names as witnesses hereto in his presence and in the presence of each other and written opposite our names our respective places of residence, believing the said George B. Abbott to be of sound mind and memory, this 8th day of April, A. D. 1911." "Think" means "believe," and when a witness prefaces his testimony with "I think," he is to be taken as testifying to what he remembers. (8 Words and Phrases, 6959; *Galveston, Harrisburg and San Antonio Railway Co. v. Parrish*, (Tex.) 43 S. W. Rep. 536.) The witness Lewis might have been able to have given a number of good reasons for thinking Shepard wrote the certificate or drew the will if he had been further questioned.

All the testimony offered and excluded by the court from the jury tended to prove that a fiduciary relation existed between testator and the devisee Frank L. Shepard, who received a substantial benefit, and, in fact, the chief benefit, under the will, and it further tended to show that the will was prepared and drawn by Shepard. This proof established *prima facie* that the execution of the will was the result of undue influence exercised by that beneficiary, and, standing alone and undisputed, would entitle appellant to a verdict. (*Weston v. Teufel*, 213 Ill. 291; *Teter v. Spooner*, 279 id. 39.) Any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other is a confidential or fiduciary relation. Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another. (12 Corpus Juris, 421; *Thomas v. Whitney*, 186 Ill. 225.) While it

may be said that the evidence of appellees in this record tends somewhat to rebut the presumption of undue influence, considering all the relevant testimony that should be in the record, still it was error in the court to exclude all the evidence and to direct a verdict. It was appellant's right to have the case submitted to a jury. The vital question in this case was whether or not all the legitimate and proper evidence offered made a *prima facie* case, because if it did not, the simple error in excluding the evidence in the transcript of the evidence before the probate court would not necessarily be fatal error. It was reversible error to exclude all the evidence and to direct a verdict.

Two letters of the deceased written to appellant, one in 1907 and the other in 1909, were offered by appellant merely for the purpose of proving that a friendly relation existed between them at those times. Both letters were in relation to a patent on a safety vault lock-device but portions of the letters were concerning family matters. The letters do disclose that a rather close and affectionate relation existed between the two brothers, but they have no relation whatever with any matters connected with this suit and are rather too remote proof of friendly relationship, even if that were a contested issue in this case. The general rule is that letters of a testator are not admissible for the purpose of destroying or invalidating his will but may sometimes be admissible for the purpose of sustaining his will. (*Crumbaugh v. Owen*, 238 Ill. 497.) It was not error in the court to exclude those letters in this case.

For the errors indicated the decree of the superior court is reversed and the cause remanded.

Reversed and remanded.

(No. 12568.—Judgment affirmed.)

MABEL HARTZELL RANDOLPH, Appellee, vs. JOHN HINCK,
Appellant.

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. **EJECTMENT**—*right to new trial is confined to trial court—res judicata.* Under section 35 of the Ejectment act the parties are allowed a new trial in the circuit court as a matter of right if they comply with the provisions of the statute; but this right is confined to the trial court, and upon second appeal to the Supreme Court the doctrine of *res judicata* applies and every question or objection which might have been raised or made in the former appeal is settled.

2. **SAME**—*only legal title is involved in ejectment—trusts.* In ejectment proceedings only the legal title is involved, and it is not competent, for the purpose of establishing a trust, to show who paid the consideration.

3. **SAME**—*equitable title is no bar to recovery in ejectment.* An equitable title forms no bar to recovery in ejectment, and even in the case of a naked trust the law is so insistent upon the legal title being sustained that it enables the trustee to recover in ejectment against the *cestui que trust*.

4. **SAME**—*defendant who is a trespasser cannot set up title in third person.* Where the defendant does not claim any record title to the property but only claims that the land was unoccupied at the time of his entry he occupies the position of a trespasser and cannot set up an outstanding title in a third person for the purpose of defeating the plaintiff's claim of title.

5. **TRUSTS**—*a trustee may convey legal title by sale or devise.* Under the common law the legal estate in the hands of a trustee possesses the same properties and incidents as if he were the absolute owner, and he may sell or devise the property, and the legal title will pass to the grantee whether the conveyance is rightly made or made in violation of the trust.

APPEAL from the Circuit Court of Randolph county;
the Hon. J. F. GILLHAM, Judge, presiding.

J. FRED GILSTER, and EDWARD ROBB, for appellant.

H. CLAY HORNER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court :

This is a suit in ejectment. The action was originally begun by appellee as a forcible entry and detainer suit, but an amended declaration was filed, and the court decided on the first hearing that the cause was one in ejectment. On the original trial in the circuit court judgment was rendered in favor of appellee, and an appeal was taken to this court, where the judgment was affirmed. (*Randolph v. Hinck*, 277 Ill. 11.) The appellant thereafter, under the provisions of the ejectment statute, made his motion for a new trial in the circuit court, which was allowed, and a second trial was had under the issues joined in the ejectment proceeding. Judgment was again entered in favor of appellee, and this appeal followed.

The facts with reference to the land here in controversy, as to its situation and surroundings and the claims of the parties thereto, are set forth quite fully in the opinion of this court in the former case and need not be here re-stated.

Counsel for appellant claim that the former suit was tried originally as if it were a forcible entry and detainer suit, and that much of the proof introduced on this hearing was not heard in the former proceeding. On the former hearing appellant based his claim almost wholly upon so-called "water rights" and admitted that the record title of the property was in appellee, while here counsel for appellant chiefly base their argument upon the claim that appellee has not shown a title justifying a recovery in ejectment proceedings. They claim, however, that on this proceeding there is a more complete showing as to the washing away of part of the land in controversy, and state that the suit formerly tried and submitted did not raise the question in the same way it is raised here. We cannot so hold. On the first trial the question as to the water rights in the land, largely based on the question of changes in the chan-

nel of the Mississippi river, and accretion, reliction and submergence with reference to the land affected, was gone into thoroughly, and this court held that the land described and conveyed in the chain of title was identical with the land on this island, known as Hinck island, and could be identified and located by situation, extent and boundary from the original survey. The additional evidence introduced on this second hearing is largely of a cumulative nature, and is not such as to materially change our views as to the right to the land with reference to changes in the channel by accretion, reliction or submergence. Under the statute, in the circuit court the parties are allowed a new trial as a matter of right if they comply with the provisions of said statute, but this right is confined to the trial court. (*Lowe v. Foulke*, 103 Ill. 58.) When a matter is brought to this court, every question which might have been raised and every objection which might have been made is settled, even in ejectment cases. "The doctrine of *res judicata* embraces not only what has been actually determined in a former suit, but also extends to any other matter which might have been raised and determined in it." (*Bradley v. Lightcap*, 201 Ill. 511.) After a full review of the authorities the same doctrine is laid down by this court in *Spitzer v. Schlatt*, 249 Ill. 416. Under these authorities we think there can be no question on this record that appellant is bound by the former decision of this court with reference to his so-called water rights in this land, and the argument of counsel for appellee that appellant is so bound on the question of the title is not without support in the decisions. We will, however, take up the question of title as if we were assuming that the decision in the former case does not control here.

On the first hearing counsel for appellant stipulated that the title was in appellee but refused to be bound by that stipulation on the second trial, and counsel for appellee introduced documents showing, as appellee argues, the rec-

ord title to be in her,—among other documents a deed from the master in chancery of Randolph county conveying this and other property to “William M. Runk, trustee;” also the will of Runk authorizing and empowering his trustees and executors, Evelyn T. B. Runk and A. Howard Ritter, “to sell any or all of my real estate at public or private sale upon such terms and conditions and for such price as they or the survivor of them may deem best, either in fee simple or for any less estate, and to make good and sufficient deed or deeds therefor,” etc.; also a deed from Ritter, executor of the estate of William M. Runk, conveying this and other property to William Hartzell. Appellee also made proof that Evelyn T. B. Runk, executrix and trustee of the will of William M. Runk, renounced her right to serve as executrix, and the deed from Ritter states that the deed was made by him alone, because said executrix and trustee under the will had renounced her right to act. The appellee also introduced the will of William Hartzell, by which he devised this property to his daughter, Mabel Hartzell, appellee herein. The documents offered in evidence by appellee tended to show a chain of title,—at least *prima facie*,—in appellee.

There was nothing in the deed from the master in chancery of Randolph county conveying this land to William M. Runk that in any way indicated the terms upon which Runk held the property as trustee, the deed merely stating that the land was conveyed to “William M. Runk, trustee.” The will of Runk was executed in 1890. On the second hearing appellant introduced a document dated in 1887, executed by Runk, in the form of a declaration of trust, wherein he declared that this land conveyed to him in the master’s deed was held by him in trust for certain persons, (naming them,) and to be conveyed by him or his executors, administrators and assigns when requested by such persons or their legal representatives. It is earnestly insisted by counsel for appellee that in this ejectment pro-

ceeding this declaration of trust, which apparently was obtained by counsel for appellant from the representatives of the Runk estate, cannot be considered as affecting the title; that a trustee such as Runk was under the master's deed is the absolute owner of the estate and exercises all the powers of ownership and that he may be treated by others as sole proprietor; while it is argued by counsel for appellant that the title which Runk held as trustee could not be devised by him.

The general rule is, that under the common law the legal estate in the hands of a trustee possesses precisely the same properties, characteristics and incidents as if the trustee were the absolute owner. The trustee may sell and devise it. (1 Perry on Trusts,—6th ed.—secs. 321-335, inclusive.) The principal question, as this author says, that here arises as to the power to devise is whether the words of the will were intended to embrace estates held by the testator in trust, and he further says (secs. 335, 336,) that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee unless a contrary intention can be collected from the expressions of the will or from the purposes or limitations to which the devised lands are subjected. We think it is clear under this reasoning and under the wording of William M. Runk's will that he conveyed to his trustees all of his real estate of every character and did not intend to limit their power to sell any trust estate that he might have. The master's deed of record in Randolph county conveyed to Runk, as trustee, the land in question, and under the doctrine laid down in Perry on Trusts, heretofore referred to, and the decisions therein cited, Runk had the power of devising the legal title to his trustees and did so devise it. In ejectment proceedings only the legal title is involved. It is not competent in such an action to show who paid the consideration money on the conveyance of the premises for the purpose of establishing a trust. (*Chiniquy v. Catholic Bishop of Chicago*, 41 Ill.

148.) An equitable title forms no bar to recovery in ejectment. (*Fischer v. Eslaman*, 68 Ill. 78.) Even in case of a naked trust the law is so insistent upon the legal title being sustained that it enables the trustee to recover in ejectment against the *cestui que trust*. (*Reece v. Allen*, 5 Gilm. 236.) A deed by a trustee for land held in trust for the use of another will pass the legal title to the grantee whether it was rightly made or made in violation of the trust under which the title was held. *Walton v. Follansbee*, 131 Ill. 147; *Chapin v. Billings*, 91 id. 539.

Counsel for appellant also insist that the deed from Ritter to Hartzell, being executed by only one of the executors named in Runk's will, did not convey the title. Under section 97 of our act on administration, (Hurd's Stat. 1917, p. 27,) passed in 1872, if an executor fails or refuses to qualify the others may execute the power, thus making it impossible, by failure or refusal to qualify, to prevent the execution of the power by the remaining executors. (*Starr v. Willoughby*, 218 Ill. 485.) Under the authorities the legal title was certainly conveyed through the master's deed to Runk, the will of Runk and the deed of one of his executors, to William Hartzell, the father of appellee. Even if it be conceded for the purposes of this hearing that appellant could rightfully introduce the declaration of trust signed by Runk and have the equitable title considered, as shown by that declaration, on this hearing, we do not think it would change the fact that the legal title was conveyed to Hartzell, regardless of the provisions of the declaration of trust; and, moreover, such declaration of trust was not recorded in Randolph county before Hartzell purchased this land, and there is nothing in the record indicating that he knew anything about it.

The argument of counsel for appellant is to the effect that under the declaration of trust offered by them it is shown that the equitable title to this property must stand in the name of the heirs and legatees of the beneficiaries

therein named, and appellant in no way claims title through any of these beneficiaries or any third person not connected with this litigation. Appellant does not claim any record title to this property but only claims that the land was vacant and unoccupied at the time of his entry, and that therefore he is entitled to it, first, because appellee has failed to prove title in herself; and second, because appellant has proved title in a third person. Appellant does not claim through or connect his title with the title of any third person in any way, and therefore, being a mere trespasser and without title, he cannot set up an outstanding title in another. *Casey v. Kimmel*, 181 Ill. 154; *Anderson v. Gray*, 134 id. 550; 9 R. C. L. 870.

The points already discussed in this opinion are the principal ones relied upon by counsel for appellant as to why the case should be reversed. They, however, do discuss other questions incidentally which they argue tend to show that there was a defect in appellee's chain of title as proved on the trial, among others, the question whether the patent from the government to the original owner of the land was sufficient to identify and convey the property; another, to the effect that the record shows that a trustee in the chain of title bought the land at his own sale; another, that the sale under a certain trust deed was made after the two years provided for in said deed; and another, that one of the plats of the property was not properly certified to. We deem it sufficient to say that we have considered all of these questions and do not think any of them should be sustained. We think the patent of the land as finally introduced in evidence satisfied the requirements of the law. We do not think that the record shows that the trustee bought at his own sale. The sale which is objected to as being made after the two years provided for in the trust deed was made more than fifty years ago and no one directly interested in the record title has objected. This point we deem without merit, as we do the one with ref-

erence to the plat not being properly certified. The conclusion necessarily follows that the trial court rightly entered a judgment in favor of appellee.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 12554.—Reversed and remanded.)

JOSEPH B. BEUTEL, Defendant in Error, vs. OSCAR G. FOREMAN *et al.* Plaintiffs in Error.

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. STATUTES—*when a statute will be given retroactive effect.* While a statute is generally deemed to be prospective, only, it will be given a retroactive effect when it is clearly the intention of the legislature that it shall so operate.

2. SAME—*words should be given ordinary meaning.* In the construction of statutes it is the duty of the court to take the words found in the statute and give to each its ordinary, usual meaning.

3. SAME—*statute cannot deprive citizen of vested right.* The legislature cannot pass an *ex post facto* law or a retrospective law impairing the obligation of contracts, nor can it deprive a citizen of any vested right by a mere legislative act.

4. PENSIONS—*amendment to section 3 of Police Pension Fund act is retroactive but is not invalid.* The amendment in 1917 to section 3 of the Police Pension Fund act, providing that the applicant for a pension must be fifty years of age, is intended to be retroactive and to apply to all persons who were entitled to claim pensions under the act before it was so amended, but the amendment is not for that reason invalid, as the right to apply for a pension is not a vested right.

5. SAME—*right to claim police pension may be taken away by State.* As between the State and the members of the police department of one of the municipalities, the State may take away the right to claim a pension under the Police Pension Fund act without affecting the contract of the claimant or violating the constitution.

WRIT OF ERROR to the Circuit Court of Cook county;
the HON. CHARLES M. WALKER, Judge, presiding.

SAMUEL A. ETTelson, Corporation Counsel, (JAMES W. BREEN, and ROY GASKILL, of counsel,) for plaintiffs in error.

GRANT NEWELL, (JOSEPH B. BEUTEL, *pro se*,) for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

A petition was filed by defendant in error and others in the circuit court of Cook county praying that a writ of *mandamus* issue against Oscar G. Foreman and others, as trustees of the police pension fund of the city of Chicago, commanding them to order that a yearly pension equal to one-half the amount of his salary be paid each of the petitioners. After the pleadings were settled a hearing was had in the circuit court and a final order and judgment entered in favor of Joseph B. Beutel, as prayed in the petition. From that judgment a writ of error was sued out from the Appellate Court for the First District, and the cause was transferred from the Appellate Court to this court, apparently on the ground that the constitutionality of a statute was involved.

The brief and argument of plaintiffs in error, and some of the earlier documents in this case, gave the name of defendant in error as Nicholas Berwick, who was the first one named in the petition for *mandamus*, whereas the testimony was taken and judgment entered in the trial court as to Joseph B. Beutel, wherefore the title has been changed by proper proceedings in this court and is now as given above.

The record shows that defendant in error, Beutel, after completing a service of twenty years as a member of the police force of the city of Chicago, filed on March 31, 1917, an application for a pension with the plaintiffs in error, the board of trustees of the police pension fund of the city of Chicago; that on July 12, 1917, his application was de-

nied on the ground that the Police Pension Fund act, as amended on July 1, 1917, provided that no policeman should be pensioned after a service of twenty years until he should have reached the age of fifty years. Plaintiffs in error deny that Beutel was fifty years of age on July 1 or July 12, 1917, and argue that therefore, under amended section 3 of the Police Pension Fund act, he was not entitled to a pension.

Section 3 of said act as amended July 1, 1917, reads, in part, as follows: "Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or regular policeman in any such city, and shall have served for a period of twenty (20) years or more as such policeman in the police force of any such city, or where the combined years of service of such person in the police department and fire department of any such city shall aggregate twenty (20) years or more, in either such case when such person shall have arrived at the age of fifty (50) or more years he may make application to said board for retirement, and said board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension."

The Police Pension Fund act for a few years prior to July 1, 1917, provided that a policeman should be entitled to his pension after a service of twenty years but did not have any provision that this could not be paid until he arrived at the age of fifty years, as does the amended act of July 1, 1917, and it is argued by counsel for defendant in error that when he retired from the police force on March 31, 1917, the law as then in force entitled him to a pension before he reached the age of fifty years if he had served twenty years continuously on the police force of the city of Chicago, and that the amendment of section 3 in force July 1, 1917, if it is intended to be retroactive and applies to this case, is unconstitutional and void. It is contended by counsel for plaintiffs in error, and conceded by

counsel for defendant in error, that said amendment to section 3 was intended to be retroactive and apply to all policemen who were entitled to pensions under said act.

While it is true that a statute is not generally deemed to be retroactive but prospective, only, in its force, a statute will be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. (*Hathaway v. Merchants' Loan and Trust Co.* 218 Ill. 580.) In the construction of statutes it is the duty of the court to take the words found in the statute and to give to each its ordinary, usual meaning. (*Eddy v. Morgan*, 216 Ill. 437.) We agree that, fairly construed, the amendment to section 3 of the Police Pension Fund act, read in connection with the other sections of the act, was intended to be retroactive and to apply to all persons who were entitled to pensions under said act, and that therefore it included the defendant in error within its provisions.

Counsel for defendant in error earnestly insist that the Pension act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the same, and therefore the amendment in question must be held to be unconstitutional because of violating a property right vested in him. The legislature cannot pass a retrospective or an *ex post facto* law impairing the obligation of a contract nor can it deprive a citizen of any vested right by a mere legislative act. (*Dobbins v. First Nat. Bank*, 112 Ill. 553.) This is a principle of general jurisprudence. "But a right to be within its protection must be a vested right. It must be something more than a mere expectation, based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. If, before rights become vested in particular individuals, the convenience of the State induces

amendment or repeal of the laws these individuals have no cause to complain." 1 Lewis' Sutherland on Stat. Const. (2d ed.) sec. 284; *People v. Clark*, 283 Ill. 221.

Counsel for plaintiffs in error contend that no person entitled to a pension has a vested legal right in said pension; that pensions, considered in connection with vested rights, must be held to be bounties of the government, which that government has a right to give, withhold or recall at its discretion, while counsel for defendant in error argue that this court in *Hughes v. Traeger*, 264 Ill. 612, and *People v. Abbott*, 274 id. 380, has held that the pensions to employees of municipalities "are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services," and that therefore those decisions which hold that a pension is not a vested right, under such circumstances as exist here in the claim of defendant in error, cannot be upheld. Counsel are in error in their argument that the decisions of this court last referred to intended to hold that the right of pension was a vested right under the circumstances found in this record. In *Hughes v. Traeger*, *supra*, the court particularly stated the opposite, saying (p. 617): "The fund created by these deductions remains subject to the disposition of the legislature, and the employees cannot prevent its appropriation in another way than that designated by the statute. It is not their property, and the statute does not amount to a contract by the State to use it in the manner provided by the statute. A change in the disposition of the fund would not, however, violate any right of the complainant, for until the happening of the event designated by the statute for its distribution he has no vested right in the fund but only an expectancy created by the law, which the law may revoke or destroy.—*Pennie v. Reis*, 132 U. S. 464; *State v. Trustees*, 121 Wis. 44." Moreover, both of the opinions in which this court has laid down the rule as to the

basis of granting pensions which counsel for defendant in error rely on as giving their client a vested right, are based on Dillon on Municipal Corporations, (vol. 1, 5th ed. sec. 430,) and that learned author, in discussing the subject of pensions for municipal employees in section 431, adopts the doctrine laid down by the United States Supreme Court in *Pennie v. Reis*, *supra*, that a person does not have a vested right in his pension. That court said in that case with reference to the pension fund (p. 471): "Being a fund raised in that way it was entirely at the disposal of the government until, by the happening of one of the events stated,—the resignation, dismissal or death of the officers,—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show that in making a disposition of a fund of that character previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State that the fund should be one for the benefit of the police officer or his representative under certain conditions was subject to change or revocation at any time, at the will of the legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law and liable to be revoked or destroyed by the same authority." This court has practically laid down the same rule in *Eddy v. Morgan*, *supra*, and *Pecoy v. City of Chicago*, 265 Ill. 78. A reading of this last case will show that something of the same argument was made with reference to the police pension fund being vested under this statute as is made by counsel for defendant in error in this case, but the court there indorsed the reasoning of this court in *Eddy v. Mor-*

gan, *supra*, and that of the United States Supreme Court in *Pennie v. Reis*, *supra*.

A full discussion of the question of vested rights in pension funds is found in *Gibbs v. Minneapolis Fire Department Relief Ass'n*, 37 Ann. Cas. 1915C, 749, (125 Minn. 174,) and in the exhaustive note following the opinion. It was argued there, as here, that the right of a person claiming a pension was a vested one, and the opinion quoted from another decision with approval, as follows: "The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable after a party enters the service, either before or after the right to a pension accrues. * * * It also follows that while there is no vested right in a pension which cannot be divested by the mere exercise of the legislative will, if relators have any rights they are vested ones so long, only, as the statute in question remains in force and unchanged, subject to be divested at any time that Congress may desire." See, also, *Stevens v. Minneapolis Fire Department Relief Ass'n*, 50 L. R. A. (124 Minn. 381,) 1018, and note reviewing the authorities; 21 R. C. L. 242; 2 McQuillin on Mun. Corp. sec. 511; 5 id. sec. 2422.

We can reach no other conclusion in this case than that by the great weight of authority in this and other jurisdictions, as between the State and the members of the police department of one of the municipalities in this State, the State may take the right of pension away, under such circumstances as shown by this record, without affecting the contract right of the pensioners or violating the constitution.

The judgment of the circuit court will be reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(No. 12496.—Judgment affirmed.)

THE PEOPLE of THE STATE of ILLINOIS, Defendant in Error,
vs. EDWARD SINGER, Plaintiff in Error.

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. CRIMINAL LAW—*question of granting a continuance because counsel is engaged in another case rests in discretion of the court.* The question of granting a continuance because counsel is engaged in another case is largely in the sound judicial discretion of the trial court, and its action will only be disturbed on appeal when it is shown that such discretion has been abused.

2. SAME—*when trial should not be indefinitely postponed.* No person accused of crime ought to be forced to the trial of his case without a reasonable opportunity to employ counsel and properly prepare for trial, but the mere fact that counsel of record for the defendant is engaged in the trial of another case which it appears will last for a considerable time is not necessarily ground for an indefinite continuance.

3. SAME—*when improper evidence volunteered on cross-examination is not reversible error.* The fact that a witness volunteers improper evidence while being sharply cross-examined is not reversible error, where the improper statement is promptly stricken by the court on motion of counsel conducting the examination.

4. SAME—*when defendant may be convicted under Confidence Game statute.* If the transaction for which a defendant is prosecuted is such as to show that he is guilty under the Confidence Game statute there is no error in trying and convicting him under such statute, although he is also guilty, by reason of the same actions, of a misdemeanor under other sections of the Criminal Code.

5. SAME—*act of 1917, relating to false checks, did not repeal Confidence Game act.* The act of 1917, (Laws of 1917, p. 344,) relating to drawing checks or drafts with intent to defraud, did not repeal the Confidence Game act, and a person may be convicted of the confidence game even though worthless checks or drafts are used in the transaction.

6. SAME—*what constitutes the confidence game—valid contracts may be used.* Any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money by taking advantage of such confidence is a confidence game, and the use of valid contracts in a swindling scheme does not prevent said scheme from being a confidence game.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. JOHN J. SULLIVAN, Judge, presiding.

CAVENDER & KAISER, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, and MARVIN E. BARNHART, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Edward Singer, was found guilty by a jury in the criminal court of Cook county of unlawfully obtaining from the West Side National Bank a large amount of money by means of the confidence game and was sentenced on this verdict to an indeterminate term in the penitentiary. This writ of error has been sued out of this court to review the judgment of the criminal court.

The evidence in the record shows that plaintiff in error in 1917 was the president and principal owner of a small private bank in Chicago known as the Wentworth Avenue Savings Bank and was also at the same time engaged in the real estate business; that on July 14, 1917, he opened an account with the West Side National Bank, located in Chicago in the same general locality as his business; that on July 17 he deposited to his account in the West Side National Bank three checks, for \$200, \$500 and \$600, respectively, signed by M. Klein, payable to Singer, and drawn on the Wentworth Avenue Savings Bank and marked as certified by the last named bank by Nat Naso, assistant cashier; that on July 20 Singer presented to the West Side National Bank a check payable to the order of cash for \$600, signed by himself, and requested the bank to pay him the money thereon; that the paying teller refused to cash this check, because, as he stated to Singer, the three certified checks which Singer had deposited to his account had not been paid; that Singer then went to Elenbogen, vice-president of the West Side National Bank, whom he per-

sonally knew and through whom he had opened his account in said bank. The evidence tends to show that Elenbogen and Singer had theretofore been acquainted for some time as members of the same lodge. It appears that some discussion ensued between Elenbogen and Singer, the latter stating that he had just come from the Wentworth Avenue Savings Bank and that the three certified checks had been paid. One of the officials of the West Side National Bank called up on the 'phone the Wentworth Avenue Savings Bank and was told by Naso, the assistant cashier, that these three certified checks were all right. Elenbogen then O. K.'d the \$600 check and the money was paid to Singer.

Nat Naso testified on behalf of the State. He had been included with Singer in the indictment upon which Singer was tried and convicted. The evidence tends to show that he was not present at the opening of the trial but had forfeited his bail. It is argued by counsel for plaintiff in error here that he had turned State's evidence because of a promise of immunity on the part of the State's attorney's office. Naso denied that he had been promised immunity and there is no evidence in the record other than his own testimony on the question. He testified that he was twenty-eight years old and married; that from May, 1916, until July 25, 1917, when the authorities closed the Wentworth Avenue Savings Bank, he had worked for Singer at said bank, being called assistant cashier; that he did everything about the bank, from janitor to book-keeper; that before the bank opened at nine in the morning he went out with a wagon and peddled fruit; that he knew of no person by the name of Klein; that no such man had ever been in the bank to his knowledge or made any deposit there; that Singer had told him to start a "dummy" account in the name of Klein, which he did, but that no money had ever been deposited in Klein's account; that at Singer's direction he made the entries in the books which were offered in evidence; that Singer signed the name "M. Klein" to a

large number of checks, and that the money to pay these checks always came from the general funds of the bank or from money that Singer would bring in cash for the purpose of paying these checks when they came in; that at the close of business July 17 the total amount of money in the bank was \$331.53, on July 18 it was \$405.73 and on July 20, \$258.67. He also testified that Singer had looked over the statement as to the amount of business done on these days and the balance on hand and O. K.'d the same. Singer testified denying that he had anything to do with making out the statements showing the amount of money on hand on those days, although he admitted that he had O. K.'d some of the statements, and he testified, as shown by the record, that on July 20 the balance in the bank was \$503.67. Naso further testified that in making up the Klein account he frequently did not make the entries when the transaction occurred but figured them up on Sundays at Singer's direction, so that the books would show all right as to that account if the State's attorney's office ever began to investigate the bank's business. Singer told the officials of the West Side National Bank, when discussing the question of these three certified checks, that Klein was a wealthy customer of his who loaned money through his bank and for which Singer received commissions. Singer admitted at the time of the trial that Klein was a fictitious person but claimed that he had used that name and opened that account because he loaned money out on weekly payments and if he loaned it in his own name he could not charge commission; that he was also accommodating one of his friends by checks signed "M. Klein" and did not want it to appear that his checks were used for accommodation paper. The evidence also tends to show that at the time of the discussion between Singer and the officials of the West Side National Bank with reference to the payment of the three certified checks in question, and shortly thereafter, vice-president Elenbogen went to the Went-

worth Avenue Savings Bank and saw Naso; that this was after banking hours and Naso told him that he could not pay those checks until he saw Singer. Naso testified that on that same day Singer had given him a check for \$745 and \$55 in currency to apply on the payment of these certified checks; that the next morning after he had told vice-president Elenbogen that he did not want to do anything about those checks until he had seen Singer, Singer took back from him the check for \$745. Naso further testified that he had never seen the three certified checks in question after he gave them to Singer to be deposited in the West Side National Bank. These three certified checks were sent by the West Side National Bank to the Federal reserve bank for collection. Assistant cashier Carr of this last named bank testified that three checks for the amounts in question were received from the West Side National Bank drawn upon the Wentworth Avenue Savings Bank; that in the due course of the business of the Federal reserve bank they would be sent by mail for collection to the Wentworth Avenue Savings Bank; that the employees of that bank who then had charge of mailing out such checks were at the time of the trial absent in government service in France; that witness did not know positively that these checks had been mailed out and did not know that the men who had charge of that work would be able to swear positively, if they were here, that such checks had been mailed to the Wentworth Avenue Savings Bank. Carr further testified that these three certified checks had never been paid to the Federal reserve bank but had been charged back to the account of the West Side National Bank. The evidence tends to show that there was a balance against Singer in the West Side National Bank's account at the time the Wentworth Avenue Savings Bank was closed out, of \$1250.18, and that neither this balance nor the amount of the three certified checks had ever been paid to said bank.

Counsel for plaintiff in error first argue that Singer should have been granted a continuance and not forced to go to trial at the time he did. The record shows that Singer was indicted September 28, 1917, and the case was continued from time to time until October 7, 1918, when it came up for trial, and that attorneys Owens and Herson appeared in court on his behalf. Attorney Owens, former county judge of Cook county, stated that he was not the attorney of record in the case and had not intended to try it; that attorney Christensen, who was the attorney of record, was then engaged in the I. W. W. cases in the Federal court before Judge Landis and had been engaged there for some weeks before, and that plaintiff in error's case ought not to be forced to trial until after attorney Christensen was through with the trial of the I. W. W. cases. Judge Owens stated that he had only discussed the merits of the case briefly with plaintiff in error and had not attempted to go into the details and had not prepared for the trial and could not fairly present the merits of the case for the plaintiff in error. Attorney Herson stated that he had never tried a criminal case and only appeared for plaintiff in error as his friend; that he had understood that the case was to be settled along the line of a civil case; that there had been several civil cases started by the West Side National Bank against Singer and that he understood some agreement was to be made between the bank officials and Singer with reference to the settlement of the account, and he asked for a continuance until attorney Christensen should be prepared to take up the trial of the case for Singer. The trial judge stated that he had told Singer and one or both of the attorneys then present, two weeks before, in open court, that Singer must be prepared to have his case tried in the near future; that he had told Singer, in effect, that he could not grant him a continuance until Christensen finished the trial of the I. W. W. cases and that the case must go to trial. It appears that the trial was

entered upon at once, attorneys Owens and Herson remaining in court and looking after the interests of Singer until the verdict was reached.

Counsel for plaintiff in error argue that under the rule of the criminal court which states, in substance, that when the State's attorney or the attorney for the accused is necessarily engaged in the trial of a case in another court the case shall be passed until the assistant State's attorney or the attorney for the accused has finished his present engagement, this case should have been passed or continued; but the rule also states that a continuance shall only be granted in the sound discretion of the court and if the party asking for the delay shows that he used due diligence to be ready for the trial and would have been ready but for the engagement of counsel. This rule, fairly construed, is in accordance with the established practice in such matters. The question of granting a continuance because counsel is engaged in another case is largely in the sound judicial discretion of the trial court and will only be disturbed on appeal when it is shown that that discretion has been abused. (*Long v. People*, 135 Ill. 435; *Condon v. Brockway*, 157 id. 90.) We think it is clear from a reading of this record as to what took place at the time the judge insisted upon the trial going on, that there was no abuse of the discretion on the part of the trial court. Of course, no person accused of crime ought to be forced to the trial of his case without a reasonable opportunity to employ counsel and properly prepare for trial, but proper practice does not require, nor does the rule of the criminal court of Cook county, that if the counsel of record for the accused is engaged in another trial the trial must be put off indefinitely to permit his regular counsel to finish the other trial, if it appears that such trial will last for a considerable length of time thereafter. The trial judge had informed plaintiff in error, some two weeks before, that the case must be tried. In view of the nature of the case this would give

him time to employ other counsel and be properly prepared to try the case when it was called. We do not think any error was made by the court in compelling plaintiff in error to go on with the trial without waiting until after attorney Christensen was through with his work in the trial of the I. W. W. cases in the Federal court. Moreover, we think from the record that the interests of plaintiff in error were well taken care of by the attorneys who acted for him during the trial.

Counsel for plaintiff in error further argue that the court improperly admitted parol proof as to the contents of the three certified checks in question without first showing that the original checks could not be produced in court. This objection seems to be raised for the first time in this court. Furthermore, we think that the proof does show that the checks could not be found. The argument for the State is that these checks were sent for collection by the Federal reserve bank by mail to Singer's savings bank, and that, as Naso testified that as a rule all mail was opened by Singer, it is a fair conclusion that these checks were received by Singer and destroyed. It is true that Singer himself denied that he opened all the mail or that he knew anything about where these checks were. However that may be, we think the evidence in the record clearly shows that the checks could not be found and that therefore parol evidence as to the contents was admissible.

It is also argued by counsel for plaintiff in error that error was committed in the trial court in permitting the State's attorney to ask plaintiff in error on the witness stand if he had not previously been accused of a crime or misdemeanor, if he had not theretofore gone under assumed or different names, and if Judge Landis, of the Federal court, had not threatened to send him to jail for thirty days. The record shows that the first reference to his trouble with Judge Landis was brought out on the cross-examination of Naso by Singer's own counsel, and that the

examination by the State's attorney with reference to that trouble was made in an attempt to have him explain the details of it. We do not think it was proper for the State's attorney to ask plaintiff in error with reference to any other offenses or with reference to having gone under assumed names unless he had proof as to such matters and thereafter offered such proof and showed it to be material and admissible. In view of this record, however, we do not think that the action of the State's attorney in this regard is of such a nature as to cause a reversal of the case.

Counsel also complain of a statement made by one Healy, who, they allege, was one of the assistants in the prosecution of this case, that plaintiff in error was not a new man in the courts, either in the criminal or in the United States court. So far as we can judge from this record, Healy was not one of the attorneys in the case but was advising in the prosecution because he was the president of the West Side National Bank and knew the facts with reference to the transaction for which Singer was being prosecuted. This statement was made by Healy in open court in answer to the suggestions of attorney Herson about an attempted settlement with the bank, and was made for the purpose of refuting the statement of attorneys for Singer that he had not had sufficient time in which to properly prepare for the trial of his case and that therefore a continuance ought to be granted. In view of the statements made by attorney Herson on these questions we do not think reversible error was committed by this statement of president Healy as to Singer not being a new man in the courts. There is nothing in the record to show that any of the jurors who tried the case heard this statement of Healy. Indeed, it was made before the jury were called into the box, and the fair inference would be from this record that none of those who served on the jury heard it.

Counsel for plaintiff in error also insist that the interests of Singer were improperly prejudiced by an answer

of witness Naso when he was on the stand, to the effect that Singer had beaten Naso's old father out of \$3500. This answer was volunteered by Naso when he was being cross-examined by the attorney for Singer and was promptly stricken out by the court on the motion of said attorney. Of course, the answer was entirely improper, but Naso was being sharply cross-examined in an attempt to show that he was as much responsible for the condition of the bank as Singer, if not more so, and it was quite natural that Naso should resent such questions. The fact that he volunteered such improper evidence was not reversible error.

It is further insisted by counsel for plaintiff in error that he was wrongly indicted for the confidence game; that his act, even though he was guilty, only made him guilty under section 102*d* of the Criminal Code, (Hurd's Stat. 1917, p. 973,) and that he could only be convicted under that statute for a misdemeanor, whereas under the Confidence Game statute he was convicted of a felony. If the transaction for which he was prosecuted was such as to show that he was guilty under the Confidence Game statute there was no error in trying and convicting him under such statute, even though he was also guilty, by reason of the same acts, under said section 102*d* of the Criminal Code. By the same act a party may be guilty of several offenses. The crime of murder may embrace an assault with a deadly weapon with intent to inflict a bodily injury, or an assault and battery. By the same act a person may be guilty of several distinct larcenies. *Freeland v. People*, 16 Ill. 380; *Nagel v. People*, 229 id. 598, and cases cited.

Counsel also argue earnestly that section 102*d* of the Criminal Code, heretofore referred to, being passed as a special statute, repeals the general statute on confidence game so far as it refers to fraudulent checks. We cannot so hold. Section 98 of the Criminal Code was passed for the purpose of covering confidence games, regardless of

whether or not a false or fraudulent check was part of the means, instrument or device used to carry out the scheme. The special statute passed in 1917 (sec. 102*d* of Crim. Code) was plainly enacted for the purpose of covering the intent to defraud by making or using in any way a check, draft or order for the payment of money upon any bank or other depository when no sufficient funds were held by such bank or other depository for the payment thereof. This last section of the Criminal Code had nothing to do with the crime of the confidence game and in no way referred to it. We shall have occasion hereinafter to refer to what is understood to be a confidence game under the Criminal Code of this State. It is plain on this record that the making of false or bogus checks was only one act in a series of acts which tended to prove that plaintiff in error had practiced the confidence game in swindling the West Side National Bank. It is true that if the legislature had enacted section 102*d* of the Criminal Code for the purpose of covering the same identical offense covered by said section 98, so far as it referred to fraudulent or bogus checks, then, under the reasoning of the authorities cited by counsel for plaintiff in error, (36 Cyc. 1152; 26 Am. & Eng. Ency. of Law,—2d ed.—738; *People v. Kipley*, 171 Ill. 44; *Deneen v. Unverzagt*, 225 id. 378;) there might be merit in their argument that plaintiff in error should have been indicted under said section 102*d* instead of being indicted for the confidence game, but the law is that a general act will not be repealed *pro tanto* by a subsequent special act when the two acts can stand together. (26 Am. & Eng. Ency. of Law,—2d ed.—743, and cases there cited.) Holding, as we do, that the proof shows that plaintiff in error was guilty of the confidence game by a series of acts which, taken together, so prove, we cannot hold, on this record, that he was simply guilty of violating the provisions of section 102*d* in passing fraudulent checks upon a bank when he did not have sufficient funds in bank to pay such checks.

Counsel for plaintiff in error earnestly argue that there is no competent evidence in the record showing that plaintiff in error was guilty of the confidence game. This court has stated more than once that any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money by taking advantage of such confidence is a confidence game. (*People v. Poindexter*, 243 Ill. 68; *Morton v. People*, 47 id. 468; *DuBois v. People*, 200 id. 157.) The use of valid contracts in a swindling scheme does not prevent said scheme from being a confidence game. (*Chilson v. People*, 224 Ill. 535.) In the present case plaintiff in error had two bank accounts, according to his own testimony, before he opened his account with the West Side National Bank. The evidence shows that there was never any money in Klein's account in the Wentworth Avenue Savings Bank; that in order to show there was money in that account, at the direction of plaintiff in error his assistant cashier had made a number of false entries in the books; that thereafter plaintiff in error, pursuant to a scheme, sought to cash checks in the West Side National Bank to a much greater amount than the actual amount of money in his bank; that he told the West Side National Bank officials that M. Klein was a rich man on the north side, when Klein was a fictitious person. The evidence shows, without contradiction, that Singer's bank was at that time in a failing condition, and tends strongly to show that it was unable to pay its depositors, and that, as he himself admits, he was rapidly losing his depositors on account of the agitation against private banks, and while there is merit in the suggestion that a business man of reasonable sense would not attempt to get the money from the West Side National Bank in the manner contended by the State, yet we think the evidence conclusively shows that Singer did attempt to get the money from the West Side National Bank in the way contended for by the State when he did not have any cash or other assets in his bank suf-

ficient to pay the three certified checks here in question. While it is true that the vice-president of the West Side National Bank stated at the time Singer complained because the \$600 check was not cashed, that if they cashed the new check before the certified checks were paid they would simply be loaning him money, it is apparent from the record that Elenbogen would not have cashed this \$600 check if it had not been for the fact that the three certified checks had been deposited by Singer with the West Side National Bank and that he was told by Singer that these certified checks had been already cashed by the Wentworth Avenue Savings Bank, and if Naso, as assistant cashier of the Wentworth Avenue Savings Bank, had not informed the officials of the West Side National Bank that these certified checks were good. It is true that some of the principal incriminating testimony against plaintiff in error was given by his former employee, Naso, but it is not true that the evidence justifying his conviction depends solely upon the uncorroborated testimony of Naso. There was much evidence in the record that tended strongly to support Naso's testimony as to the business of the bank and the condition it was in at the time of this transaction, and also to corroborate him as to the transaction with reference to the Klein account in the savings bank, and that said account was a "dummy" account, made up at the direction of Singer. Indeed, Singer's own testimony in its material features corroborates Naso's testimony on many of the vital questions in the case. The evidence fully justified the verdict of the jury and the judgment of the trial court.

We find no reversible error in the record. The judgment of the criminal court will therefore be affirmed.

Judgment affirmed.

(No. 12511.—Judgment affirmed.)

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(KATHERINE KRAUJALIS, Defendant in Error.)

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. WORKMEN'S COMPENSATION—*when shooting of an employee arises out of employment.* Where an employee, while engaged in the course of his employment, is shot and killed by another employee with whom he had had a quarrel and a fight because the deceased, as a part of his duties, had reported the other's absence from work, the injury and death are an incident to and arise out of the employment.

2. SAME—*when a locomotive boiler-washer is not engaged in inter-State commerce.* A locomotive boiler-washer employed in a round-house where engines were kept which hauled inter-State and intra-State trains is not engaged in inter-State commerce while working on an engine which had not been assigned to any particular train.

CARTWRIGHT and DUNN, JJ., dissenting.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

M. L. BELL, and A. B. ENOCH, for plaintiff in error.

JOHN L. HOPKINS, and A. G. ABBOTT, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Alexander Kraujalis was employed by the Chicago, Rock Island and Pacific Railway Company in its yards at Blue Island as a locomotive boiler-washer. While engaged in work he was shot and killed in the round-house of the railroad company by another employee of the company who was known as a machinist's helper and was employed by the same company. The killing occurred Monday night, November 19, 1917. Kraujalis left surviving him a wife and two children, and application was made for compensation under the Workmen's Compensation act, it being

claimed that the death occurred in the course of and arose out of the employment of deceased.

Kraujalis was, as we have said, a locomotive boiler-washer, and for some months his assistant or helper in that work was his brother-in-law, Kaupus. Saturday night, November 17, Kaupus was not on duty, and Hunt, a machinist helper, was assigned to the duty of assisting deceased in the work. Through the week machinist helpers were let off at 11:30 P. M. and on Saturday night at 10:30 P. M. Saturday night, November 17, Hunt quit and left his work about 10 o'clock P. M., and deceased was left without any helper. Kraujalis reported that fact to the foreman, Dan Dougherty, and the foreman directed him to get a Mexican to help him the rest of the night. Monday night, November 19, Kaupus was assisting Kraujalis as his helper and Hunt was at work as a helper to a machinist named Deady. About 7 o'clock P. M. the deceased went to the store-house for some oil, and about the same time Hunt was sent by Deady to the same store-house for some cotter-keys. The two men met in the store-house and a quarrel ensued. Hunt called deceased a vile name and they engaged in a fight. Kraujalis threw Hunt down and held him for some minutes. Hunt pleaded with him to be allowed to get up, which Kraujalis permitted him to do, and when he arose he struck Kraujalis on the jaw and "put him out." Kraujalis called for his brother-in-law, Kaupus, who came to the store-house and threw Hunt out. He testified Hunt said Kraujalis had reported him to the boss and that if he was fired he would kill Kraujalis. Immediately afterwards Kraujalis and Kaupus went to the office of Dougherty, the foreman, and reported that Hunt was fighting them. Hunt had returned to his place of work and Dougherty and the two men went to where Hunt was engaged and Dougherty called for Hunt. He came to where the men were and there struck or tried to strike Kaupus with a sledge hammer. In some manner the sledge hammer got

out of Hunt's hands and Kaupus testified he then tried to grab him in the breast. About that time another employee came by with a hose on his shoulder, and Kaupus took the hose and struck Hunt with the end of it, on which was a metal tip. The blow staggered Hunt, and when he recovered he ran or went away. Kraujalis and Kaupus went back to the engine they were washing out. Kaupus turned the water on and Kraujalis was handling and directing the hose. While they were thus engaged Hunt came with a revolver and began shooting at Kaupus. One bullet passed through Kaupus's shirt and he ran away. Hunt then shot Kraujalis, wounding him so severely that he died.

The above is the substance of the material testimony as to how the death occurred. The arbitrator before whom the application for compensation was heard denied compensation. A petition for a review was filed before the Industrial Commission, and upon the hearing the commission awarded compensation to the applicant. The award was confirmed by the circuit court of Cook county, and that court certified the cause was a proper one to be reviewed by the Supreme Court. Accordingly the case is before us by writ of error.

A reversal is asked by the plaintiff in error upon two grounds: (1) The injury to deceased which caused his death did not arise out of his employment; (2) both deceased and Hunt were engaged in inter-State commerce at the time of the shooting and no award can therefore be made under the State Compensation act.

The determination of the question whether an injury arose out of the employment in some cases presents one of the most difficult problems in connection with the act. (Glass on Workmen's Compensation, 40.) This court has in several cases adopted the definition of the Supreme Court of Massachusetts in the *McNicol* case, 215 Mass. 497, viz.: "It [the injury] arises out of the employment when there is apparent to the rational mind, upon consideration

of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment." (See *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96; *Mueller Construction Co. v. Industrial Board*, 283 id. 148.) Kraujalis was not the superior of Hunt in the sense that he had authority to discharge him, but his (Kraujalis') work was such that he could not perform it without the assistance of a helper. When the helper quit before the work was completed it was his duty to ask the foreman for help, which made it necessary for him to inform the foreman his helper had quit work. It was the performance of this duty that aroused the anger of Hunt and caused him to quarrel and fight with Kraujalis. It does not appear that Kraujalis at any time was the aggressor or sought an altercation with Hunt. The meeting of the two men at the store-house the night of the shooting was accidental. Hunt had learned Kraujalis had reported to the foreman that Hunt had quit work Saturday night before quitting time and began abusing Kraujalis and called him an offensively vile name. They engaged in a fight, but Kraujalis, who was the larger man, does not appear to have done anything more than throw Hunt down and hold him until he pleaded to be allowed to get up. This Kraujalis permitted him to do, and he then struck Kraujalis on the jaw,—a blow which a witness said "put him out." It was also testified Hunt there said Kraujalis had reported him and if he was discharged he would kill him. When Kraujalis and his helper, Kaupus, went with the foreman to the place where Hunt was at work, Hunt was the aggressor according to the testimony and sought to strike Kaupus with a sledge hammer. It

is not shown by the testimony that Kraujalis there said or did anything. After Kraujalis and Kaupus had returned to and were engaged in the duties of their employment Hunt came to them with a revolver and began shooting at Kaupus. When he ran away he then turned on and shot Kraujalis, who was holding and directing the hose in washing out the boiler. The shooting was incidental to and arose out of the employment. It cannot be said, as a matter of law, that the injury was such a one as might happen to anyone and did not arise out of the employment. "It [the risk of injury] may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith." (*Bryant v. Fissel*, 84 N. J. L. 72.) There was a causal connection between the conditions under which Kraujalis was required to perform his work and the injury. It cannot be said that the proof does not tend to show that the shooting of Kraujalis was caused by his report to the foreman that Hunt had quit work. This the nature of his work required him to do, as he was obliged to ask the foreman for another helper. He was acting entirely in the line of his duties, and this brought upon him the murderous assault by Hunt with a gun. That such an attack is an unusual and extraordinary result makes it none the less an incident of the employment. There is no dispute that Kraujalis was shot in the course of his employment, and we cannot say the Industrial Commission and the circuit court erred in finding the injury arose out of the employment, and this conclusion is sustained, in principle, by *Trim School District v. Kelly*, 7 B. W. C. C. 274, where the teacher was assaulted and killed by bad and unruly pupils. *Polar Ice and Fuel Co. v. Mulray*, (Ind.) 119 N. E. Rep. 149; *In re Heitz*, 218 N. Y. 148.

It was stipulated at the hearing that plaintiff in error was engaged in both inter-State and intra-State commerce. There was a division point on plaintiff in error's road after

leaving Blue Island, at Silvis, Illinois, a city of about three thousand population, about eight miles east of the Iowa line. The engines which hauled inter-State trains to Silvis hauled inter-State trains coming from the west from Silvis to Chicago. The proof tends to show that there were five engines in the round-house at Blue Island that were used principally for inter-State trains, and it is claimed the engine Kraujalis was working on when shot was one of them. Its number was 2008. The road foreman of equipment testified there was no written order assigning engines to different trains; that if the exigencies required it they would not let an engine lie idle but would use it on any train when for the benefit or advantage of the company. It was the duty of the foreman to assign the power. At times engine 2008 was used in intra-State service. At the time Kraujalis was at work on the engine it had not been assigned to any particular train. In *Minneapolis and St. Louis Railroad Co. v. Winter*, 242 U. S. 353, it was alleged in the declaration that the plaintiff, when injured, was making repairs on an engine and that the parties were engaged in inter-State commerce. It was stipulated that the engine had been used in hauling freight trains over defendant's lines, which freight trains carried both intra-State and inter-State commerce, and was so used after the plaintiff's injury. The court said: "This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an inter-State haul to be repaired and go on. It simply had finished some inter-State business and had not yet begun upon any other. Its next work, so far as appears, might be inter-State or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its

employment at the time,—not upon remote probabilities or upon accidental later events.” That decision appears to us conclusive of the contention of plaintiff in error that the parties were at the time of the injury engaged in interstate commerce.

The judgment of the circuit court is affirmed.

Judgment affirmed.

CARTWRIGHT and DUNN, JJ., dissenting.

(No. 12533.—Judgment affirmed.)

SWIFT & CO., Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(BEATRICE KUCINSKI, Admx., Defendant in Error.)

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. WORKMEN'S COMPENSATION—*finding of a fact sustained by competent evidence cannot be reviewed.* Where there is competent evidence before the Industrial Commission fairly tending to prove a fact, the finding of that fact by the commission precludes its review in the Supreme Court.

2. SAME—*section 24 of Compensation act, as to notice of injury, is complied with by notice to the foreman.* Section 24 of the Workmen's Compensation act, providing that the employer shall be notified of the injury within thirty days, is complied with where the injured employee immediately after the injury tells the foreman of his employer about the accident.

3. SAME—*proviso to section 21 does not apply to compensation awarded under paragraph (a) of section 7 of Compensation act.* By paragraph (a) of section 7 of the Workmen's Compensation act the employer becomes liable, at all events, in case of an injury resulting in death, to pay the amount of compensation therein provided for, and the proviso to section 21, as amended in 1915, regarding the reduction of compensation in case of the death of the beneficiary, does not apply to compensation awarded under paragraph (a) of section 7.

4. SAME—*Industrial Commission is not required to determine shares of beneficiaries under paragraph (a) of section 7 of the Compensation act.* Paragraphs (a) and (f) of section 7 of the Workmen's Compensation act do not require a determination by

the Industrial Commission of the proportionate share which each beneficiary is entitled to receive in case of the death of an employee where the beneficiaries are all of the class specified in paragraph (a). (*Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34, distinguished.)

5. SAME—*when sum for medical services should not be included in award.* Where there is no evidence before the Industrial Commission as to what medical expenses were incurred by the injured employee within eight weeks of the injury or of the first day of disability but the only testimony as to medical services is that of a physician selected by the employee more than five months after the injury, the employee, under section 8a of the Workmen's Compensation act, must be held to have engaged such services at his own expense and an allowance for medical services should not be included in the award.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

T. M. COEN, for plaintiff in error.

CHARLES W. LAMBORN, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Cook county affirmed the award of the Industrial Commission in favor of the defendant in error, Beatrice Kucinski, administratrix of the estate of Tony Kucinski, deceased, for injuries received by him while in the employ of the plaintiff in error and from which it is claimed he subsequently died.

Tony Kucinski was at the time of his death twenty-eight years of age, and for a number of years, with short intervals of absence, was in the employ of the plaintiff in error. His last employment was for about one year. It appears from the evidence that the alleged accident occurred on or about September 10, 1915. While the deceased was pushing a truck loaded with boxes and cases he slipped and fell and some of the cases fell upon him, striking him in the region of the back and hip. It appears that he left the employment of the plaintiff in error about four weeks after

the injury. For a time after that he was able to be about and walk with the aid of a cane and had some medical treatment. On December 27 following he was taken to the Michael Reese Hospital, where upon examination his hip was found to be infected with incipient tuberculosis and an operation was performed for the removal of an abscess. On February 24, 1916, a more advanced tubercular hip condition was found. Thereafter it was discovered that his lungs were tubercular. About May of the same year he was taken to the Cook County Hospital and died the following August of pulmonary tuberculosis. Application for the adjustment of this claim was filed February 25, 1916. The testimony of deceased was taken in the Cook County Hospital on the 11th day of May, 1916. Beatrice Kucinski, his widow, was appointed administratrix of his estate and appears as defendant in error here.

It appears from the evidence that prior to the injury deceased had enjoyed good health; that he had never had any trouble with his hip or leg and had never limped or suffered from rheumatism. The testimony of attending physicians tends to show that the appearance of tubercular infection at the hip was caused by the blow received by the deceased in the accident in question and that the infection later spread to his lungs, causing death. It does not appear to be urged by the plaintiff in error that the accident was not the cause of death.

The commission found as a fact that both the deceased and the respondent were working under and subject to the Workmen's Compensation act of Illinois; that the deceased did on the 10th day of September sustain an accidental injury which arose out of and in the course of the employment; that the respondent had notice of the accident and that claim was made within the time prescribed by law; that the deceased died as a result of the accidental injury; that respondent is liable for hospital and medical services to the amount of \$150, in addition to compensation of \$6.50

per week for a period of 416 weeks. The circuit court affirmed the award after striking from the same the sum of \$150 awarded for medical services.

It is contended by the plaintiff in error that no notice was given of the alleged accident within thirty days thereafter, as required by the Compensation act; that since the deceased is survived by a widow and a minor child it is error to award compensation to the administratrix of the estate of the deceased, such right to compensation being an independent right vested in the dependents of the deceased; that the commission having held compensation was due to the representative of the estate, it was error to refuse to determine the relative interests of the surviving dependents in such and to apportion the same between the dependents upon demand and request of plaintiff in error on the hearing before the Industrial Commission. Cross-errors are assigned by the defendant in error averring that the court erred in striking from the award of the Industrial Commission the sum of \$150 for medical services.

Concerning the contention of plaintiff in error that no notice of the injury was given, as required by section 24 of the Workmen's Compensation act, the record shows that the deceased testified concerning the manner of his injury, and that immediately after the injury he told Joe Lukide, a foreman of plaintiff in error, that he had been injured and how it happened; that he was sent to the company doctor, who examined his hip, applied medicine of some sort and told him that he would be all right by the next day; that he returned to work but that the pain increased for three or four weeks, at the end of which time he told Lukide that his hip hurt him so much that unless he could get easier work he would have to quit, and that Lukide told him there was no other job for him and that he should go home and stay there until he was ready to come back. Section 24 of the Workmen's Compensation act provides, among other things, that notice of the injury shall be given

within thirty days, with certain exceptions, and further provides "that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice-principal in the enterprise." The commission found that notice of the injury was, in fact, given as required by statute. There is evidence in the record tending to prove that deceased notified Lukidc, who the deceased testified was plaintiff in error's foreman, of the injury shortly after its occurrence. While it is earnestly urged that Lukidc was not a foreman of the plaintiff in error, it is not the province of this court to weigh the testimony on that point. As has been repeatedly held by this court, where there is competent evidence before the commission fairly tending to prove a fact, the finding of that fact by the commission precludes its review here. (*Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34; *Big Muddy Coal Co. v. Industrial Board*, 279 id. 235; *Albaugh-Dover Co. v. Industrial Board*, 278 id. 179.) As the foreman was the agent of the plaintiff in error, it follows that section 24, regarding notice, has been complied with. *Wabash Railway Co. v. Industrial Com.* 286 Ill. 194; *Parker-Washington Co. v. Industrial Board*, 274 id. 498.

Plaintiff in error's second contention is that the court erred in affirming an award of compensation to the administratrix while the evidence shows that the widow and a child survived; that while compensation for disability prior to death is payable to the administrator, compensation on account of death is payable to the dependents; that it was not only the duty of the commission to award the compensation to the dependents, but it was incumbent upon it to apportion the compensation between the widow and child.

Section 7 of the Compensation act, as amended in 1915, provides as follows: "The amount of compensation which shall be paid for an injury to the employee resulting in

death shall be: (a) If the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than \$1650 and not more in any event than \$3500. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death."

Paragraph (f) of said section 7 provides as follows: "The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries, and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: *Provided*, that, in the judgment of the court appointing the personal representative, a child's distributive share may be paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employee shall relieve him of all obligations as to the distribution of such compensation so paid. The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him."

In support of his contention that the Industrial Commission should apportion the amounts due to the several beneficiaries, counsel for plaintiff in error cites *Smith-Lohr Coal Co. v. Industrial Com. supra*. The question decided in that case arose by reason of a contest between the widow and the parents of the deceased as to who was entitled to the compensation, and this court in that case held: "The statute as to distribution of the amount paid by the employer to the personal representative of the deceased applies only

in cases where the employer voluntarily pays the compensation to the personal representative of the deceased without a hearing and determination before an arbitrator or the Industrial Commission. If the compensation is fixed by the Industrial Commission it is required to determine who is entitled to the compensation before it can determine the amount. * * * The fact that the claimants were the persons described in paragraphs (a) and (b), under which paragraphs the amount of the compensation provided is the same, could not operate to relieve the Industrial Commission from the duty of determining the person or persons who were entitled to the compensation. We do not construe the statute in such cases as this to leave it to the probate court to determine who is entitled to the award made by the Industrial Commission." In the case at bar there is no contest as to who shall receive the benefit of the award, and the rule laid down in the *Smith-Lohr Coal Co. case* on that point has no application here.

It is also contended that in view of the proviso in section 21 of the Compensation act, providing for the reduction of compensation in the event of the death of the beneficiary before the completion of the compensation payments, it is necessary to determine what the relative interests of the widow and child are in the compensation, so that, in the event of the death of either, the payments of compensation, so far as the deceased beneficiary is concerned, can be determined and the employer not subject to a judgment and execution for the entire amount. Section 21, as amended in 1915, provides in this regard as follows: "Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment: *Provided*, that upon the death of a beneficiary, who is receiving compensation provided for in section 7, leaving surviving a parent, sister or brother of the deceased employee, at the time

of his death dependent upon him for support, who were receiving from such beneficiary a contribution to support, then that proportion of the compensation of the beneficiary which would have been paid but for the death of the beneficiary, but in no event exceeding said unpaid compensation, which the contribution of the beneficiary to the dependent's support within one year prior to the death of the beneficiary bears to the compensation of the beneficiary within that year, shall be continued for the benefit of such dependents, notwithstanding the death of the beneficiary."

The proviso in section 21 applies to those cases where the beneficiary receiving compensation provided for in section 7 dies leaving surviving a parent, sister or brother of the deceased employee who was at the time of his death dependent upon the said deceased employee for support and who was receiving from such beneficiary a contribution towards support. In this case the only beneficiaries are the widow and a child, whose compensation is payable under paragraph (a) of section 7. The death of either of these beneficiaries would not leave surviving "a parent, sister or brother of the deceased employee," hence it follows that the proviso in section 21 has no application to compensation awarded under paragraph (a) of section 7. As we understand paragraphs (a) and (f) of section 7, they do not provide for determination by the Industrial Commission of the proportionate share which each beneficiary is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of said section, although, as was held in the *Smith-Lohr Coal Co. case*, the commission must, in order to determine the total amount of compensation, determine who is entitled to receive the same. That case does not, however, hold that it is incumbent upon the commission to determine how much or what proportion of the compensation every member of the class may receive. As was said by this court in the case of *Wangler Boiler and Sheet Metal Works Co. v. Industrial Com.* 287 Ill. 118: "Compen-

sation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right and one that can be affected only by the act of the legislature that gave it. (*Hansen v. Brann & Stewart Co.* 90 N. J. L. 444.) The intention of the legislature to so treat that right is shown by section 9 of the act, which, as we have seen, provides that where a lump-sum settlement is awarded by the Industrial Board in case of an injury resulting in death there is no right of rejection either by the employer or beneficiary. The intention of the legislature that such right shall be a vested right is further shown by paragraph (g) of section 19 of the act, which provides for judgment in the circuit court on an award where there is a refusal or failure to pay the compensation, such judgment being treated as similar to an execution.—*Friedman Manf. Co. v. Industrial Com.* 284 Ill. 554." By paragraph (a) of section 7 the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of the employee, within the limitations there prescribed as to amount, and as we view the provisions of section 21 of the act the legislature did not intend that its provisions regarding reduction of compensation should apply to cases enumerated in said paragraph. The commission therefore did not err in making the award without determining the amount to which each beneficiary is entitled.

It is urged by cross-errors assigned by defendant in error that the circuit court erred in striking from the award the sum of \$150 for medical services. There is no evidence as to what medical expenses were incurred by the deceased prior to February 24, 1916. The award of the Industrial Commission relative to the amount for medical services is

based upon the testimony of Dr. Mueller for his services between the 24th day of February and the first day of April following, in the year 1916. The services were not rendered within eight weeks of the date of the alleged accident, to-wit, September 10, 1915, or within eight weeks of the first day of disability. The deceased was evidently under treatment prior to February 24. The services of Dr. Mueller were rendered at the request of the deceased. Section 8a of the statute in question, relative to medical and hospital services in case of injury not resulting in death, as amended in 1915, is as follows: "The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200. The employee may elect to secure his own physician, surgeon or hospital services at his own expense." There is no evidence in the record tending to show that the deceased requested plaintiff in error to supply medical services, other than the letter of his attorney on February 24, 1916, to plaintiff in error, stating that he assumed that plaintiff in error would assume all obligations of the Workmen's Compensation act. Plaintiff in error maintains a staff of physicians. The testimony of deceased showed that he was familiar with that fact, yet he chose other medical aid in the treatment he received prior to February 24 and subsequent to the day of the injury, when the evidence shows he went to the company doctor. His selection of Dr. Mueller on February 24 was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense. The circuit court did not err in striking the sum of \$150 from said award.

No reversible error appearing in the record the judgment of the circuit court will be affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT took no part in this decision.

(No. 12184.—Appellate Court reversed; circuit court affirmed.)
**THE CHICAGO TITLE AND TRUST COMPANY, Admr., Plain-
 tiff in Error, vs. THE CORPORATION OF THE FINE ARTS
 BUILDING, Defendant in Error.**

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. ADMINISTRATION—*administrator has no inherent authority to conduct retail store business.* The functions of an administrator or executor are to close up the estate for which he is acting, and he has no inherent authority, as such officer, to conduct a retail store business.

2. SAME—*claim for expenses of administration is not consistent with claim of lien for installments of rent arising out of lease to the deceased.* A claim of a lien for installments of rent, which is based on the terms of a lease assigned to the deceased, is not consistent with a claim for rent as an expense of administration, as the former arises out of the contract of the deceased and is a claim against the estate, while the latter arises wholly out of the action of the representative and is a claim against the representative.

3. SAME—*what are proper expenses of administration is question to be passed upon by probate court.* What are proper items of expenses of administration is a question to be passed upon by the probate court so that the estate and its creditors may have opportunity to appear and be heard, and it is error for the Appellate Court, on an appeal involving only the question of right to a lien for installments of rent, which is based upon the terms of a lease, to find that the amount claimed as rent should be classified and allowed as expenses of administration and given priority as such.

4. SAME—*contingent claims cannot be allowed under section 67 of Administration act.* The holder of a contingent claim is not a creditor of the estate of a deceased, and claims dependent on a contingency which may or may not ripen into a liability cannot be proved and allowed under section 67 of the Administration act, as that section refers only to claims on which there is an absolute liability, though the time of payment is postponed.

5. SAME—*what determines whether probate court shall allow claim not due.* The power of the probate court to allow a claim which is not due depends upon the filing of the claim within the year allowed for filing claims and also upon the absolute liability of the deceased, though the claim is not due during said year.

6. SAME—*when a claim for future installments of rent is contingent.* A claim for future installments of rent from the end of the year allowed for filing claims against the estate of the deceased

assignee to the end of the term provided for in the lease is a contingent claim, where there are circumstances beyond the control of either party to the lease or specified contingencies which may prematurely terminate the lease; and such a lease is to be distinguished from a contract to purchase on installments, where the obligation is to pay at all events.

7. *SAME—suit for installments of rent not allowable as a claim may be brought against representative or heirs of deceased.* The fact that a claim for future installments of rent cannot be proved against an estate because the liability is contingent does not bar the claimant from bringing an action against the representative personally or against the heirs of the deceased for installments that actually accrue under the contract of the deceased during the occupation of the premises by the estate.

8. *SAME—failure to close up estate does not change law as to allowance of claims.* Failure to close up an estate and confusion in the administration on the part of the executrix do not change the law applicable to the allowance of claims payable out of the assets inventoried.

9. *LIENS—description in a chattel mortgage must be sufficiently specific to identify property.* The rule that the description of property mortgaged must be sufficiently specific to afford third persons the means of identifying the property refers to chattel mortgages as well as to mortgages of land.

10. *SAME—what description in lease is not sufficient to create lien for rent on after acquired property of lessee.* A provision in a lease that the lessor shall have a first lien for installments of rent upon the "lessee's property now or hereafter located in said premises" is too indefinite to create a lien upon property of the lessee subsequently acquired.

11. *LEASES—property of assignee of lessee cannot be pledged for rent by mere assignment of lease.* By the mere assignment of a lease by the lessee the property of the assignee located in the building cannot be bound for installments of rent under a provision in the lease for a lien upon property of the lessee so located, and in the absence of a provision in the contract of assignment expressly pledging properly described property of the assignee for the payment of rent no such lien exists.

12. *SAME—a covenant creating lien for rent does not run with land.* A covenant in a lease that the lessor shall have a first lien upon the "lessee's property now or hereafter located in said premises" is not a covenant concerning the thing granted or the enjoyment of it but is a collateral and personal covenant and does not run with the land.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. DAVID F. MATCHETT, Judge, presiding.

E. I. FRANKHAUSER, FREDERICK A. BANGS, and ARTHUR M. COX, (RICHARD H. COLBY, and JUDAH, WILLARD, WOLF & REICHMANN, of counsel,) for plaintiff in error.

TENNEY, HARDING & SHERMAN, and WILSON, MOORE & McILVAINE, (HORACE KENT TENNEY, of counsel,) for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

This is *certiorari* to the Appellate Court for the First District to review a judgment of that court reversing a decree of the circuit court of Cook county, heard on appeal from an order of the probate court of that county allowing a certain claim against the estate of Winfield Scott Thurber, deceased, and a decree, also entered by that court, declaring said claim and other claims to be liens on the property of said estate by virtue of a certain lease in which deceased was lessee.

The defendant in error leased a six-story building, described as 208 Michigan boulevard, in the city of Chicago, to the Bissell-Cowen Piano Company for a term of ten years from April 30, 1909, for a rental of \$2166.67 per month. One of the provisions of the lease is as follows: "The lessor shall have a first lien upon the interest of lessee under this lease and upon lessee's property now or hereafter located in said premises, to secure the payment of all moneys due under this lease." This lease was assigned by the Bissell-Cowen Piano Company, with the consent of the defendant in error, to the Æolian Company. On January 27, 1913, the Æolian Company assigned the lease to

Thurber. All these assignments were made with the written consent of the lessor, defendant in error herein. Each assignment carried with it the continuing liability of the assignor and contained the stipulation that the assignee would not assign the lease. Thurber sub-let to other parties all of the building except the first and sixth floors, which he occupied up to the time of his death. Thurber died September 24, 1913, leaving a last will and testament, which was duly proven and admitted to probate, in which Martha C. Thurber, his wife, was named sole legatee and executrix. Letters were issued to Martha C. Thurber, who continued to act as executrix of the last will and testament of W. Scott Thurber until the plaintiff in error, the Chicago Title and Trust Company, was appointed administrator *de bonis non*, etc. Two days after letters testamentary were issued to Martha C. Thurber, on petition of the executrix, an order was entered authorizing her to continue the business for a period of sixty days, provided that all profits revert to the estate and all losses be paid by the executrix individually, and that such time should not exceed sixty days. Within that time an order was entered in the probate court, upon petition filed by the executrix, to sell at public or private sale that part of the personal property consisting of the stock of merchandise,—i. e., oil paintings, etchings, water colors, picture frame moldings, glass, etc., theretofore appraised at \$61,910.50, at not less than the appraised value. The executrix continued in possession of the property, executed sub-leases to tenants and collected rent from them, and to enforce the collection of the rent brought suit in her name as executrix. In her report to the probate court, filed July 2, 1915, she claims credit for payment of rents so made and charges herself with collection of rent from sub-tenants.

The rent under the lease for the month of September, 1913, was due and unpaid at the time of Thurber's death, and a claim was filed and allowed by the probate court as

a seventh-class claim for the amount of \$2166.67. On September 26, 1914, defendant in error filed a claim for rent for the months of July, August and September of that year, which was allowed December 15, 1914, by the court in the amount of \$6225.01 as of class 7, without prejudice to the claim of the defendant in error to the preferred and prior claim upon the assets of said estate. No appeal was perfected from these two claims so allowed. In addition to this, a claim was filed on September 26, 1914, three days before the close of the year for administration, for rent not due but to accrue for the premises for the period from October 1, 1914, to April 30, 1919, at the rate of \$2166.67 a month, \$119,166.67. On June 24, 1915, this claim was allowed as of class 7 for the amount of \$8042.77, being the rent due for the premises in question from October 1, 1914, to March 31, 1915, on which last date defendant in error had sold the building in question.

On December 24, 1914, the defendant in error filed its petition praying that the claims for rent theretofore allowed (\$8391.68) be decreed to be first and prior liens upon the personal property of the deceased located within Cook county at the time of his death by virtue of the terms of the lease; that the same be paid before other claims, including the widow's award; that the claim for rent for the months of October, November and December, 1914, amounting to \$6550.01, be paid as costs and expenses of administration and made a first and prior charge against all the assets of the deceased; that the rent accruing thereafter as long as the executrix occupied or controlled the building, and the rent accruing in the future, be allowed as part of the costs and expenses of administration; that the executrix pay to the petitioner all rents in her possession collected from sub-tenants. On June 24, 1915, the date of the allowance of the claim above mentioned for \$8042.77, the probate court heard this petition and decreed that all the claims allowed, amounting to \$16,434.45, be

given priority under the lien contained in the lease. The decree also included the claim on that day allowed for \$8042.77, though it does not appear to have been included in the petition. The court ignored that part of the petition asking that rent after October 1, 1914, be allowed as expenses of administration. The decree specifically found that such lien arose from the lease. There is nothing in the decree finding that said claims were entitled to priority as expenses of administration, nor is there anything in the petition for lien from which it could be inferred that the petition was seeking to have the previously allowed claims re-classified as expenses of administration. No petition for a re-classification of these claims from the seventh class, in which they were allowed, appears anywhere in the record. It is evident that the probate court made no attempt to pass upon the question of what constitute proper allowances of rent as expenses of administration in the case. Its decree is based solely on the ground that the claimant is entitled to such lien under its lease. While pleadings in such a case are limited, yet it is evident from the record that no attempt was made to have these claims re-classified.

The estate perfected two appeals to the circuit court: One from the order of June 24, 1915, allowing as of the seventh class the sum of \$8042.77 as rent after the year for administration had passed; and the other from the decree granting priority to the three claims, amounting to \$16,434.45.

It was admitted by the plaintiff in error in the circuit court, and likewise here, that the first claim for rent for the month of September, 1913, due and unpaid at the time of the death of Thurber was properly allowed as a claim of the seventh class by the probate court, and that the claim as allowed by the court in the sum of \$6225.01 as a claim of the seventh class was properly allowed, and that these two claims should stand as found. No appeal was perfected from either of these claims. Plaintiff in error con-

tended in the circuit court, as it does here, that the claim allowed by the court to the amount of \$8042.77 was, at the time the claim was filed, for rent not due until after the expiration of the period for filing claims and is contingent and should not have been allowed, and that the defendant in error is not entitled to a lien on the assets of the estate under the lease.

The circuit court held that the claim upon which an allowance of \$8042.77 was made was a contingent claim when filed, and that although it was filed before the close of the period for filing claims it was not an absolute debt provable against the estate of the deceased, and denied said claim. That court also held that the terms of the lease were not sufficient to give to the landlord a lien on the property of the estate sought to be made subject thereto. The circuit court made no attempt to pass upon the priority of the claims as expenses of administration, expressly holding that such matter was not in the record and was not passed upon.

The claimant appealed to the Appellate Court for the First District, and that court held that it was not necessary to pass upon the holding of the circuit court that the claim for rent after the period for filing claims was a contingent claim, and also held that it was not necessary to pass upon the holding of that court that the lease was not sufficient to grant a lien, for the reason that (as it held) \$16,434.45, the total of the three claims allowed, were proper charges against the estate as expenses of administration and allowable as such. The Appellate Court reversed the decree of the circuit court and remanded the cause, with directions to that court to enter judgment for the sum of \$16,412.77 as expenses of administration. It appears from the record that neither the probate nor circuit court had that issue before it. The original petition was for a lien under the lease and not for a re-classification. Neither the estate nor its creditors have had an opportunity to appear and be heard on what constitutes a proper allowance as expenses of ad-

ministration. The questions involved and urged in the appeal to the Appellate Court were the effect of the lease as to its constituting a lien and that of the allowance of rent under the lease after the period for filing claims had passed. The Appellate Court, however, arrived at the conclusion, from the record, that the full amount of the three claims was properly costs of administration. We have examined the record with a view to determining whether this conclusion can be sustained on the record and are of the opinion that it cannot.

The functions of an administrator or executor are to close up the estate for which he is acting. He has no authority, as such officer, to conduct a retail store business. Such is beyond the scope or functions of his office. (*Grace v. Seibert*, 235 Ill. 190; *Smith v. Preston*, 170 id. 179.) The record does not disclose any authority from the probate court to conduct the business of the deceased further than is found in an order entered October 1, 1913, which authorized the executrix to conduct the business for a period not to exceed sixty days. It is urged that this authorization was extended indefinitely by a subsequent order of November 13, 1913. That order directed that the executrix "proceed to sell that part of the personal property consisting of the stock of merchandise," etc., "at public or private sale, as provided by law, for not less than the appraised value," etc. We are unable to agree with the contention of counsel for defendant in error that this was an extension of authority to conduct business. On the contrary, that order, in effect, directs the closing out of this stock. It is an order to sell, with no authorization to buy to replenish the stock as contemplated in conducting a retail business. It follows that the order of November 13, 1913, did not extend the authority of the executrix beyond the period of sixty days.

It is unnecessary to pass upon the question as to whether the probate court had authority to authorize an extension

of time for the conduct of the business by the executrix, as the record discloses no such extension. Nor is there in the record any further evidence of such authority. There appears to have been no report of account filed by the executrix prior to July 2, 1915.

What, under all the circumstances of this case, would constitute a proper allowance as expenses of administration is not before this court. There has been no hearing on that matter. No evidence has been offered upon that subject in the probate or circuit court, other than that of the occupancy of the premises by the executrix, which would enter into the determination of that question. The petition of defendant in error in the probate and circuit courts asked that a lien be declared for the sum of \$8391.68 arising out of the contract of lease of the deceased. While the petition prayed that installments of rent accruing after October 1, 1914, be declared expenses of administration of the estate, yet the probate court made no disposition of that question, and the defendant in error, as such petitioner, appears to have taken no appeal from the decree of the probate court but followed the appeal of the executrix in the circuit court and there defended the decree giving priority, under the lease, to this item for rentals. The decree was based solely on the ground that a lien was given by the lease. It is evident that this was the theory upon which the case was tried in the probate and circuit courts, and that the other creditors of the estate have not had their day in court or a hearing on what would be proper expenses of administration.

There is a broad distinction between a lien for installments of rent which arises out of a lease, and the classification of a claim as expenses of administration. The former arises out of the contract of the deceased, while the latter arises wholly out of the action of the representative. The former is a claim against the estate of the deceased, while the latter is a claim against the representative. (*Smith &*

Co. v. Williams, 178 Ill. 420; Schouler on Wills, Executors and Administrators,—5th ed.—par. 1256.) Such claims are inconsistent. 18 Cyc. 880; *Meyer v. Cole*, 12 Johns. 349.

We are of the opinion that the record does not afford any basis for the holding of the Appellate Court, and without passing upon what would in the present case constitute proper items of expenses of administration, as that matter must be passed upon by the probate court, we are of the opinion that the Appellate Court erred in finding, from this record, that said amount should be classified and allowed as expenses of administration and given priority as such.

The defendant in error contended in the Appellate Court that the circuit court erred in holding that the lease did not create a lien on the property of the deceased in the premises in question at the time of his death. Section 12 of the lease provides as follows: "That lessor shall have a first lien upon the interest of lessee under this lease and upon lessee's property now or hereafter located in said premises, to secure the payment of all moneys due under this lease." It is contended by the defendant in error that the language, "lessee's property now or hereafter located in said premises," is a description of the property of the estate sufficient to create a lien against such property. Regarding such a lien this court said in *Borden v. Croak*, 131 Ill. 68: "The lien claimed is one where the property is left in the possession of the debtor, and it is therefore in the nature of a mortgage rather than a pledge and is to be governed by the rules of law applicable to chattel mortgages." Also: "The question, then, is whether a contract for the sale or mortgaging of subsequently acquired chattels will be specifically enforced in equity where no chattels are specifically described, the only description being that contained in the general word 'property.' It is undoubtedly the rule that the equitable title to goods, as well as to land, is confined to specific property and does not extend to goods which are undetermined. As said by the Lord Chancellor

in *Holroyd v. Marshall*, 10 H. L. Cas. 191: 'A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse is a contract relating to specific property and which would be specifically performed.' In *Tadman v. D'Epineuil*, 20 L. R. Ch. Div. 758, a party by a written instrument charged 'all his present and future personalty' to secure future indebtedness to plaintiff and afterwards became indebted to him, and upon the principles laid down in *Holroyd v. Marshall* it was held that the instrument operated to charge all the personal property belonging to the debtor at the date of the instrument but did not operate to charge subsequently acquired property. In *Belding v. Reed*, 3 Hurl. & Colt. 955, a debtor assigned to his creditor, by bill of sale, all his household furniture, plate, linen, etc., and all his other personal estate and effects whatsoever, then being or thereafter to be upon or about his dwelling house, farm or premises, or elsewhere in Great Britain, upon trust to sell and satisfy his debt. Power was given the creditor to enter the premises where the goods assigned might be and take possession thereof, but it was provided that until he should see fit to do so the debtor might retain possession. After five years, the debtor having in the meantime become a bankrupt, the creditor, after having demanded payment, entered, and, with other goods of the debtor, seized goods which the debtor had acquired subsequent to the execution of the bill of sale. In an action of trover by the assignee in bankruptcy it was held that as the goods were not identified by the bill of sale the creditor took no title to them and that the action might be maintained."

The rule that the description must be sufficiently specific to afford third persons the means of identifying the property refers to chattel mortgages as well as to mortgages of

land. (*First Nat. Bank of Joliet v. Adam*, 138 Ill. 483.) The language, "lessee's property now or hereafter located in said premises," does not in any way describe or specify the nature or character of the property nor in any way attempt to determine what the after-acquired property shall be and is therefore too indefinite to create a lien on after-acquired property. (*Borden v. Croak*, *supra*; *First Nat. Bank of Joliet v. Adam*, *supra*.) Even though this language were sufficiently definite to create a lien on after-acquired property of the lessee, it might well be doubted whether it should be held to cover the property of the assignee of such lease, in the absence of a specific undertaking of the assignee that it should do so. By the terms of the assignment Thurber agreed to assume the lease and agreed "to make all payments yet to be made and to perform and abide by all the obligations of the lessee under this lease." There appear to be no decisions in this State directly in point on this question. It is said in *Tiffany on Landlord and Tenant* (vol. 2, p. 1969): "There has apparently been no decision upon the question whether the goods of an assignee of a leasehold, or of a sub-tenant, brought by him upon the premises can be subjected to a lien created by the lessee, but it would seem that they cannot be so subjected, since the lessee has no right to create a lien upon property in which he has no interest, and the provision for a lien cannot be regarded as a covenant which will run with the land since it concerns chattels and not land, and there is, moreover, some difficulty in construing a provision for a lien intended to create a 'real' obligation, as creating a personal obligation by way of a covenant. * * * To create a lien on chattels thereafter brought onto the premises, however, they must, it has been decided, be specifically referred to, and a provision for a lien on lessee's property is consequently insufficient for this purpose."

It is evident that a lessee has no authority to bind the goods and chattels of his assignee under a lease as he has

no interest in the goods pledged by such a contract, and the transaction lacks the first essential of a valid pledge,—that the pledgor have title to the property pledged. Nor would an undertaking on the part of an assignee to pay rent and to keep all covenants to have been kept by his assignor have the effect of bringing his property under such a lien. An agreement of an assignee to keep such a covenant of the original lessee is an agreement to keep a covenant which the original lessee had no power to keep. A contract for lien on the property of an assignee of a lease is a contract which the original lessee did not make and could not have made. It is separate and collateral to the contract for the payment of rent. It follows, therefore, that in the absence of a provision in a contract of assignment expressly pledging the property of the assignee for the payment of rent no such lien exists against the after-acquired property of the assignee of a lease.

But it is contended this is a covenant to pay rent and therefore a covenant that runs with the land. We do not think so. This court held in *Purvis v. Shuman*, 273 Ill. 286: "The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or estate conveyed. An illustration of the rule is found in *Wiggins Ferry Co. v. Ohio and Mississippi Railway Co.* 94 Ill. 83. * * * The court said that in order that a covenant may run with the land its performance or non-performance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment." The covenant in question was not a covenant

concerning the thing granted or the enjoyment of it but was a collateral and personal covenant, and as such it does not run with the land. *Purvis v. Shuman, supra*; 24 Cyc. 918; *Farrington v. Kimball*, 126 Mass. 313.

It follows from the foregoing that the provisions of the lease were not sufficient to create a lien on the property of the deceased, and the circuit court did not err in so holding.

The remaining question in the case is whether the claim of \$8042.77 allowed for rent after the period of administration was passed was a valid charge against the estate or was a contingent claim and not so provable.

On September 26, 1914, defendant in error filed in the probate court a claim for rent, as follows: "To rent not due but to accrue for the premises 202 Michigan boulevard, Chicago, Ill., for the period October 1, 1914, to April 30, 1919, at the rate of \$2166.67 a month, \$119,166.67." While this claim was filed three days before the expiration of the year fixed by the statute for the filing of claims, the claim is for rent not due until after the year for filing claims was passed. There appears to have been no hearing on this claim until June 24, 1915, when, as we have seen, \$8042.77 was allowed as a balance due to March 31, 1915, as a seventh-class claim, and on the same day decreed to be a lien on the property of the estate on the premises by virtue of the lease. It is contended by plaintiff in error that rent not due at the death of the testator and unearned during the period for filing claims was a contingent claim and should not have been allowed. The defendant in error contends that as the executrix continued in occupation after the year for filing claims, this entitled the landlord to have this claim allowed for the period of occupation, and that, in any event, it was not a contingent claim.

It is well settled in this State that claims dependent on a contingency which may or may not ripen into a liability cannot be proved and allowed under section 67 of the Administration act. Said section refers only to claims on

which there is an absolute liability although the time of payment is postponed, and has no reference to contingent claims. The holder of a contingent claim is not a creditor of the estate. If his claim remains contingent during the whole of the year allowed for the exhibition of the claims against the estate he cannot participate in the distribution by the administrator. (*Union Trust Co. v. Shoemaker*, 258 Ill. 564; *Pearson v. McBean*, 231 id. 536; *Mackin v. Haven*, 187 id. 480; *Snydacker v. Swan Land and Cattle Co.* 154 id. 220; *Dugger v. Oglesby*, 99 id. 405; *Stone v. Clarke's Admrs.* 40 id. 411.) If this claim for rent was a contingent claim and remained such during the year allowed for the exhibition of claims, then the holder of that claim was not during such year a creditor of the estate and such claim cannot be allowed against the estate under said section 67, to be paid, on distribution by the executor or administrator *de bonis non*, from the estate inventoried. By section 70 of the Administration act claims which are not exhibited or filed during the first year allowed for administration are barred from sharing in the estate inventoried. While this claim was exhibited during the year following the issuance of letters testamentary, this fact will avail nothing if the claim was, in fact, a contingent one. Nor will the fact that it was allowed at a much later date aid the claimant, for the reason that the power of the probate court to allow the claim at all must be based on two premises: First, the filing of the claim within the year; and second, the absolute liability of the deceased though the claim is not due during said year.

Is this claim for the rentals covering the balance of the term a contingent claim? We are of the opinion that it is. There are different contingencies in a lease of this character, the happening of which is not within the control of either party to it, which may defeat all right to recover rents, as where the building shall be so injured by fire as to be untenable, then, unless it be repaired in thirty days,

the lessee as well as the lessor may terminate the lease; also it is provided in the lease that in case the lessor desires to re-build the building he may terminate the lease. This cannot be said, therefore, to present such an absolute liability as that contemplated in section 67 of the Administration act, and, indeed, such a rule would be most far-reaching in its consequences, for if A leases a building for a term of years to B and B dies, and A be allowed to have out of the assets of the estate inventoried by its representative the total rentals less the discount provided for by the statute, a solvent estate might be rendered insolvent to the exclusion of all other creditors. Such a result could not have been contemplated by the legislature in the enacting of section 67. This is to be distinguished from a contract to purchase land on installments, for in the latter case the obligation is to pay at all events. The fact that such a claim cannot be proved against an estate does not bar the claimant from bringing an action against the representative, personally, or the heirs of the deceased, for installments that actually accrue under the contract of the deceased. As was said in *Snydacker v. Swan Land and Cattle Co. supra*, concerning claims arising on contract of the testator which did not accrue till after the estate was closed, quoting with approval *Hall v. Marten*, 46 N. H. 337: "The general principle laid down is this: that the heir is liable, to the extent both of the personal and real estate received from his ancestor, for the contracts or liabilities of the ancestor, and that where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir to the extent of such assets which he derived from the ancestor."

While it appears from the record here that the estate was not closed when this claim was filed, it further appearing that the executrix's report of account has not yet been approved nor the estate closed, yet so far as the right to have this claim allowed and paid out of the assets inven-

toried is concerned the situations are analogous. Nor does the fact of confusion and failure to close up the estate on the part of the executrix change the law applicable to the allowance of claims payable out of the assets inventoried.

As the claim for \$119,166.67 for unaccrued rentals is a contingent claim, there is no authority, under the statute, for its allowance. The allowance of any part of such a claim was an allowance under the terms of the lease. That such allowance was so made is evidenced by the fact that the probate court allowed the sum of \$8042.77 as a seventh-class claim. Any allowance of this claim as a liability under the lease must have been made by authority of section 67. The allowance of any portion of this claim under said section was, as we have seen, erroneous. We are of the opinion that the circuit court did not err in holding said item of \$8042.77 to be a claim which cannot be allowed to participate in the distribution of the assets inventoried.

As we understand the record, the claim of \$2166.67 for rent for the month of September, 1913, and the claim of \$6225.01 balance for the year of administration, having been allowed as seventh-class claims and no objection thereto being made by the estate, by the records of the probate and circuit courts stand allowed as seventh-class claims. The question what should be allowed as expenses of administration may properly be brought before the probate court for determination.

For the foregoing reasons the judgment of the Appellate Court will be reversed and the decree of the circuit court will be affirmed.

Judgment of Appellate Court reversed.

Decree of circuit court affirmed.

(No. 12624.—Decision of board affirmed.)

THE WABASH RAILROAD COMPANY, Appellant, vs. THE
BOARD OF REVIEW OF COOK COUNTY, Appellee.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

TAXES—*State may tax money on hand April 1 received from operation of railroads under Federal control.* While the power of a State to tax does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States, the act of Congress providing for the operation and control of railroads by the Federal government was enacted as a temporary war measure and was not intended to deprive the States of the power of taxation of railroads which they possessed and exercised prior to the passage of the act, including the power to tax money on hand April 1.

CERTIFICATE of appeal to review the decision of Board of Review of Cook county.

JOHN GIBSON HALE, for appellant.

EDWARD J. BRUNDAGE, Attorney General, and CLARENCE N. BOORD, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The Wabash Railroad Company made and filed with the board of assessors of Cook county a schedule of personal property showing cash on hand on April 1, 1918, \$10,000. The board of assessors raised the amount to \$50,000, and made return of its assessment of one-third of that amount (\$16,667) to the board of review. The railroad company filed its objection to the action of the board of assessors with the board of review, claiming the cash on hand was not its property but was the property of the United States government by reason of the government's control and operation of the railroad since January 1, 1918, and that all such moneys received from such operation and control, under the provisions of section 12 of the Federal Railroad Control act, were the property of the United States govern-

ment and not subject to taxation by the State. The board of review confirmed the assessment, and the railroad company, claiming to act for the Director General of Railroads of the United States, appealed to the Auditor of Public Accounts, and he has pursuant to the statute filed in this court a certified statement of the facts, including the affidavit of F. L. O'Leary that he is Federal treasurer of the Wabash Railroad Company; that between January 1, 1918, and June 1, 1918, all moneys received from the operation of the road in excess of disbursements made in operation of the road were in certain depositories and carried in the name of the Wabash Railroad Company; that all moneys on hand April 1, 1918, in banks in Cook county, or with station agents or other depositories, were received from the operation of the road subsequent to January 1, 1918, and belonged to and were the property of the United States government. The question presented is whether the money scheduled was subject to taxation by the State authorities.

It was settled by the decision of the Supreme Court of the United States in *McCulloch v. State of Maryland*, 4 Wheat. 429, that the power of a State to tax does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States, and that doctrine has since the decision of that case been adhered to by Federal and State courts. Did the taking over by the United States government of the control and operation of railroads under the act of Congress providing for the operation and control of railroads by the Federal government render the money received from their operation exempt from taxation by the State?

Section 1 of the said act of Congress provides that the President having in time of war taken over the possession, control and operation of certain railroads and systems of transportation, is authorized to agree with and guarantee to any such carrier making operating returns to the Inter-

State Commerce Commission that during such Federal control it shall receive as compensation not exceeding a sum equivalent, as nearly as may be, to its average annual railway operating income for the three years ended June 30, 1917. Said section further provides: "Every such agreement shall provide that any Federal taxes * * * commonly called war taxes, assessed for the period of Federal control beginning January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control, or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues, or any part thereof, derived from operation, * * * shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, whenever levied or payable, shall be paid by the carrier out of its own funds or shall be charged against or deducted from the just compensation." Section 10 provides "that carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government: * * * *Provided, however,* that when the President shall find and certify to the Inter-State Commerce Commission that in order to defray the expenses of Federal control and

operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, * * * it is necessary to increase the railway operating revenues," the Inter-State Commerce Commission, in determining the reasonableness of a rate, shall take into consideration the finding by the President, together with such recommendations as he may make. Section 12 declares moneys derived from the operation of the carriers during Federal control to be the property of the United States, and "disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and * * * are chargeable to operating expenses or to railway tax accruals. * * * If such revenues are insufficient to meet such disbursements the deficit shall be paid out of such revolving fund in such manner as the President may direct." Section 15 provides "that nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or to lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds."

By the terms of the act Federal control was not to continue to exceed twenty-one months after the war. We understand the taking over of the operation and control of the railroads by the Federal government was a temporary war measure, and that they did not thereby become instruments or agencies of the government for the purpose of carrying into effect powers of the government conferred by the people,—at least to the extent that their property was not subject to taxation by the States. It would seem from the provision of section 1 "that other taxes assessed under Federal or any other governmental authority" during Federal control, "or on the revenues, or any part thereof, derived from operation, * * * shall be paid out of revenues derived from railway operations while under Federal con-

trol," and from the provisions of sections 10, 12 and 15 relating to tax accruals, that it was not the intention of Congress to deprive the States of the power of taxation which they possessed and exercised prior to the passage of the act temporarily taking over, not the ownership but the operation and control of railroads.

The decision of the State taxing authorities in assessing the property is approved and the assessment confirmed.

Decision affirmed.

(No. 12585.—Reversed and remanded.)

WILLIAM SEGGEBRUCH, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(HENRY J. LUECKE, Defendant in Error.)

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. WORKMEN'S COMPENSATION—*when occupation at time of injury determines whether parties are under the Compensation act.* Where an employer who has not elected to come under the Workmen's Compensation act follows a varied line of business, the nature of the employment and the occupation of the employee at the time of his injury determine whether or not the parties are under the act by virtue of the provisions of section 3.

2. SAME—*purpose of Compensation act in specifying hazardous occupations.* The purpose of the Workmen's Compensation act in specifying certain occupations as extra-hazardous is to secure to employees engaged in such occupations a greater degree of protection than was afforded by the law previous to the enactment of the act, and in the absence of election by the employer it was not the purpose to extend the provisions of the act to occupations not having any connection with the extra-hazardous occupations mentioned in section 3.

3. SAME—*when employee is not engaged in hazardous occupation.* An employee who is injured while unloading and spreading manure over certain farm land of his employer is not engaged in an extra-hazardous occupation under section 3 of the Workmen's Compensation act, although at certain times in the year he was engaged in running his employer's grain elevator.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

BOWLES & BOWLES, and O'DONNELL, DONOVAN & BRAY, for plaintiff in error.

BARR, MCNAUGHTON & BARR, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Will county affirmed an award of the Industrial Commission in favor of defendant in error, Henry J. Luecke, for injuries received by him while in the employment of the plaintiff in error.

Defendant in error was injured on the 8th day of February, 1915, while engaged in hauling manure and refuse from the barn of the plaintiff in error to certain farm land owned and operated by plaintiff in error. It appears from the evidence before the arbitrator that at the time and prior to the day of the accident in question the plaintiff in error was engaged in farming, in conducting a retail flour and feed store, a saloon, a grain elevator, and in retailing sand, gravel, tile and brick, in the village of Crete, Will county, Illinois. The elevator was the usual grain elevator located near the railroad tracks, to which farmers hauled their grain over a dump, from which the grain was elevated to bins by machinery driven by an electric motor. The grain in the elevator was shipped out in cars, and part of the grain was hauled by teams from this elevator to Chicago Heights, a distance of about five miles, and part of the grain was hauled to a feed store operated by plaintiff in error at the village of Crete. Plaintiff in error owned and operated a farm of 117 acres about one mile from the village, and also owned a subdivision to the village of about 20 acres. The brick, tile, stone, gravel and sand were handled direct from the cars on which they were shipped into Crete or were sometimes unloaded onto the ground

along the grain elevator switch track and hauled out by the farmers. Sometimes the gravel was hauled direct from the cars or the storage on the ground aforesaid direct to the public roads by the teams of the plaintiff in error. The accounting part of all business except the saloon was carried on in the office located at the feed and flour store. The plaintiff in error had four or five horses at the time of the accident. These horses were kept in the barn on the premises where the feed store and the residence of the plaintiff in error were located and were used in connection with all of his aforesaid businesses. The manure from the barn was in a concrete bin adjoining the barn, and when the bin was full the men employed by plaintiff in error would haul it out to the farm and onto the land in the subdivision. On the day of the accident defendant in error was emptying the bin and hauling the contents thereof onto the subdivision with a team and wagon, and while unloading the manure he was either thrown or fell from the wagon and was badly injured. He was sent to the hospital at Chicago Heights, where he remained for several months and at which place one leg was amputated because of the condition produced by the injury.

Several men were employed by the plaintiff in error, none of whom, including the defendant in error, had any regular duty. Defendant in error did every kind of work for the plaintiff in error except office work. Sometimes he worked at the elevator, at which time he stopped and started the machinery; at other times he worked in connection with the gravel, sand, brick and tile, unloading or hauling the same from the car; at other times he hauled grain from the elevator to Chicago Heights; at other times he hauled flour and feed to the store buildings at Crete; at other times he worked on the farm during the farming season. Defendant in error testified that he took care of the teams; that he did not know the character of the work he did the day before the accident. On cross-examination he stated that

he was hauling manure for fertilizer; that he had hauled the same that year to other places; that he worked the land for plaintiff in error during the proper season; that on the day of the accident he hauled manure because he did not have any other work on hand; that the elevator was used in the fall when grain came in; that he did not know whether or not he worked in the elevator during the month of February in which he was injured.

The Industrial Commission found that defendant in error and plaintiff in error were operating under and were subject to the terms and provisions of the Workmen's Compensation act; that the injury of the defendant in error was an accidental injury arising out of and in the course of his employment; that the applicant sustained temporary total disability for a period of 24 weeks and the loss of one leg; that medical and hospital services were furnished by the plaintiff in error to the extent of \$40, and that applicant had expended in addition thereto \$160 during a period of eight weeks after the accident. The commission allowed an award of \$6 per week for 24 weeks, and a further award of \$6 per week for 175 weeks and said amount of \$160. Plaintiff in error filed his petition for a writ of *certiorari* in the circuit court of Will county, and that court affirmed the award and quashed the writ.

The only contention of the plaintiff in error is that the court erred in affirming the award, for the reason that the plaintiff in error was not under the provisions of the Workmen's Compensation act either by election or by virtue of the hazardous nature of his business or employment. It is admitted that neither the employer nor employee had elected to come under the provisions of said act. Whether or not the parties hereto were under the Workmen's Compensation act depends upon the nature of the employment and the business engaged in at the time of the injury. It is evident plaintiff in error followed a varied line of business, and the test is whether or not the defendant in error was at the

time he was injured working in a line of employment which comes within the purview of section 3 of the Workmen's Compensation act. *Vaughan's Seed Store v. Simonini*, 275 Ill. 477.

It is urged by defendant in error that plaintiff in error was engaged in conducting an elevator business and that such elevator business is a hazardous occupation. It was said in *Vaughan's Seed Store case, supra*: "The reasonable interpretation of paragraph (b) of section 3 is, that the provisions of paragraph (a) shall only apply to an employer engaged in the extra-hazardous occupations mentioned, * * * and it was not intended that employers engaged in such extra-hazardous occupations should for that reason be subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances. The defendant in error was not an employer of the plaintiff in error in any of the extra-hazardous occupations mentioned in section 3, and plaintiff in error was not exposed to any of the dangers arising from such extra-hazardous occupations. Whether or not the defendant in error, as to any part of its business, was subject to the provisions of the Workmen's Compensation act, it was not subject to such provisions so far as plaintiff in error was concerned." The defendant in error, as appears from the record, was at the time of his injury engaged in the spreading of fertilizer over certain farm land of the plaintiff in error. This occupation was that of farming,—a business not included within paragraph (b) of section 3 of the Workmen's Compensation act. In the case of *Fruit v. Industrial Board*, 284 Ill. 154, the employer was engaged in the retail coal business and the employee was injured while employed in that business. It was urged that because of the fact that the employer conducted also the business of delivering goods for a wholesale house he was thereby brought under paragraph (b), section 3, of the act as a carrier. This court there held that whether or not

he had at times engaged in the business of delivering goods for others was immaterial, as the employee was, at the time he was injured or employed, not working in that line of employment or in doing anything connected therewith.

By section 1 of the Workmen's Compensation act any employer is authorized to elect to provide and pay compensation for accidental injuries to his employees arising out of and in the course of the employment. He is not, however, required by the act, under that section, to pay such compensation, as such payments are entirely voluntary. If he does not so elect he remains subject to the same liabilities and may make the same defenses as before the passage of the act. Section 3 limits this right of election, as that section presumes that all employers engaged in the different occupations or businesses therein specified have elected to come under the act in case such employers do not act concerning an election, and if they do elect not to come under the act they surrender the right to introduce the defenses of assumed risk, negligence of fellow-servants and contributory negligence. The intention and purpose of the Workmen's Compensation act in specifying certain occupations as extra-hazardous and in depriving the employer of the right of said defenses thereto is to secure to the employees engaged in such extra-hazardous occupations a greater degree of protection than was afforded by the law previous to the enactment of that act. It was not the purpose to extend the provisions of the act to occupations not having any connection with the extra-hazardous occupations mentioned in section 3. To hold otherwise would be to hold that said section 3 applies to all occupations, and that all employers come under the act, regardless of whether or not they had elected to do so. The fact that the defendant in error here did at times operate the machinery of the elevator does not aid his contention, for the reason that he was not engaged in that occupation at the time of his injury nor was he engaged in any occupation incident thereto

and had not been during the month in which he was injured. The fact, if it be a fact, that his employer would at times engage in occupations coming within section 3 is of no avail here, where the injury of the employee did not arise out of or in the course of his employment at such hazardous occupations or any occupation incident thereto. *Fruit v. Industrial Board, supra; Vaughan's Seed Store v. Simonini, supra; Hochspeier v. Industrial Board*, 278 Ill. 523.

As the defendant in error was not engaged in any occupation referred to in section 3 and there was no election on his part or on the part of the employer to come under the Compensation act, it follows that they were not operating under said act and that the Industrial Commission was without jurisdiction to award the compensation in this case, and the circuit court erred in affirming the award and quashing the writ of *certiorari*.

It is urged by the defendant in error, on cross-errors, that the circuit court should have stricken from the record the testimony taken before the Industrial Commission but not heard by the board of arbitrators, for the reason that the transcript of said testimony taken on review was not filed within the time prescribed by the act. As it appears from the testimony taken before the board of arbitrators that the defendant in error was not engaged in an extra-hazardous occupation and was not therefore within the purview of the Compensation act, which facts are not in any way changed by the testimony taken before the commission on review, it does not become material here to decide whether or not the transcript of said testimony taken on review was properly preserved or filed in apt time.

The judgment of the circuit court will therefore be reversed and the cause remanded to said court, with directions to set aside the findings of said commission and quash the record.

Reversed and remanded, with directions.

(No. 12104.—Reversed in part and remanded.)

OSCAR HEINRICH, County Clerk, *vs.* CHRISTOPHER HARRIGAN *et al.* Appellees.—(THE PEOPLE *ex rel.* County of Peoria *et al.* Appellants.)

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. **APPEALS AND ERRORS**—*when question of revenue is involved.* The question of revenue is involved when some recognized authority of the State or some of the municipalities authorized by law to assess and collect taxes are attempting to proceed under the law to collect the same and when the controversy is whether the funds in dispute belong to the revenue of the county or State or some division thereof.

2. **SAME**—*executors cannot appeal, as executors, from order of the probate court in favor of estate.* Executors cannot appeal, as executors, from an order and judgment of the probate court in favor of the estate on a citation against them to inventory property claimed as their own, and where they have appealed as executors they cannot, by stipulation in the circuit court, change the proceeding to one under sections 81 and 82 of the Administration act and thus escape the binding force of the probate order and judgment, from which they have not appealed as individuals.

3. **TAXES**—*no lien attaches to tax certificates for unpaid taxes.* The words "personal property" in section 254 of the Revenue act, and the words "goods and chattels" in section 137, are to be construed as having the same meaning and as comprehending only such personalty as may be made subject to levy and sale under an execution on a judgment at law, and where tax redemption money is paid in to the county clerk no lien attaches thereto for unpaid taxes due from the holder of the tax certificates, which are mere choses in action.

4. **SAME**—*tax collector can enforce collection of taxes only by lien of his warrant.* The tax collector is authorized to demand and receive pay for taxes or enforce a lien on his warrant, and if payment is not voluntarily made to him and he has no lien he has no further authority to institute an action to recover the amount of the taxes.

5. **SAME**—*when bill of interpleader cannot be maintained as in nature of a creditor's bill.* Where a county clerk, who is sued by an executor to recover redemption money for tax certificates, files a bill of interpleader, making the county a defendant because it

claims the money for unpaid taxes on the estate, the bill of interpleader cannot be maintained as a bill in the nature of a creditor's bill, where there is no judgment against the estate or the estate is not shown to be insolvent.

6. ADMINISTRATION—*when an administrator pro tem need not be appointed.* An administrator pro tem is not necessary in a case where there is already an executor duly appointed although the executor is claiming property as his own in opposition to the estate he represents, as the appointment of such an administrator is authorized only under section 72 of the Administration act where the executor has filed a claim against the estate.

7. SAME—*proceeding under section 81 of Administration act to compel executor to inventory property is against him individually.* A proceeding under section 81 of the Administration act to compel an executor to inventory property which he claims in opposition to the estate he is administering is a proceeding against him individually.

8. PRACTICE—*practice where necessary party files a disclaimer.* A disclaimer is a mode of defense, and if it prevails the defendant must be dismissed, as a general rule, with costs, but if a defendant attempts to disclaim in a case where his disclaimer does not entitle him to a dismissal but must, notwithstanding his disclaimer, still be retained as a party defendant in order that the subject matter of the case be finally disposed of, he should be retained in the suit and his disclaimer stricken from the files.

APPEAL from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding.

C. E. McNEMAR, State's Attorney, (DAN R. SHEEN, of counsel,) for appellants.

MANSFIELD & COWAN, for appellees.

Mr. CHIEF JUSTICE DUNCAN delivered the opinion of the court:

Michael Harrigan died in the county of Peoria on October 8, 1911, having in his possession certain tax certificates of purchase amounting to about \$5000. He left a will, by which he bequeathed and devised all his property, real, personal and mixed, equally to his brother, Christopher Harrigan, and his two sisters, Maggie and Kate Harrigan,

after the payment of his debts. The executors, Christopher and Kate Harrigan, at first refused or neglected to probate the will. An administrator was appointed by the probate court of Peoria county, and being advised that there was a large amount of notes and choses in action belonging to the estate of the testator, made strict search for the same in the home where the testator had lived and died but for some time could learn nothing about such assets from the executors or otherwise. He finally found a small safe owned by the deceased in a small room or closet adjoining the kitchen. The safe was under a stairway and was skillfully concealed by hanging clothes and other such articles on the wall over it. He finally succeeded in getting the safe open, and then for the first time the executors named disclosed that there was a will, and two of them, Christopher and Kate Harrigan, filed the will for probate and were qualified as executors, the other, Maggie Harrigan, declining to become an executrix. The testator up to his death lived with his sister Maggie, where the safe was found, and Christopher and Kate lived in Chicago. About two weeks after the testator's death Kate delivered the tax certificates to Christopher, claiming that she had been told by the deceased to deliver them to Christopher because they were his property.

At the time of his death Michael was in arrears to the county of Peoria for back taxes for ten years previous to his death, amounting to the sum of \$5226.13. The county clerk of said county had in his possession \$1523.46 in redemption money collected by him since the death of the testator from land owners named in some of the tax certificates. The county of Peoria served notice on the county clerk to hold said redemption moneys and to apply the same as a payment upon the indebtedness of Michael for taxes to the county. Thereafter Christopher demanded of the county clerk that he pay to him said redemption moneys in exchange for the proper tax certificates then in his possession and indorsed in blank "M. Harrigan," but the clerk

declined to do so. Christopher then brought suit in assumpsit against the clerk to recover the redemption money. The county clerk, Oscar Heinrich, then filed a bill of interpleader in the circuit court of said county, making Christopher and the county of Peoria defendants, praying that they be required to interplead and settle their right to said funds, that complainant might bring the funds into court, and that Christopher be enjoined from further prosecuting his suit against him. The court so ordered, and the complainant turned over the redemption money to the circuit clerk and the court discharged the complainant from any further liability and referred the cause to the master in chancery, with directions to take and report the evidence, together with his conclusions of law and fact.

The first inventory filed by the executors included as property of the deceased at the time of his death cash on hand, \$5; tender money in the hands of the circuit clerk in an unsettled suit, \$356.40. This inventory was approved in open court on June 17, 1912. Another inventory was thereafter filed in which were scheduled items of wearing apparel of the deceased of trifling value and was not approved. Another inventory was then filed on the order of the court which included, in addition to the items inventoried in the first two inventories, \$750 in the hands of the county clerk and in litigation. The executors further reported in the inventory that in the safe owned by Christopher Harrigan and in the residence where Michael Harrigan died, which residence was owned by Maggie Harrigan, were certain notes and mortgages (describing them) totaling \$9025, all of which were prior to the death of Michael Harrigan, and "are now, the property of Kate Harrigan;" that there was another note signed by H. R. Woland for \$3000, and also certain tax certificates amounting to about \$3000, which note and certificates "were owned by Christopher Harrigan and are now the property of Christopher Harrigan;" that all the notes and mortgages

and tax certificates aforesaid were listed, not as the property of the deceased but merely for the purpose of complying with the order of the court. Objections were filed to this inventory by the county, the State of Illinois and William and Winifred Harrigan, a brother and sister of the testator not named in his will. A citation was issued by the county court commanding the executors to show cause by July 8, 1912, why all the property described in said last inventory should not be inventoried as the property of the estate. They answered the citation by claiming that said property was their individual property, as aforesaid, and was not the property of the deceased. On the hearing the court found and decreed that all of said property, including the tax certificates, was the property of Michael Harrigan at the time of his death and not the property of Christopher and Kate or either of them, and ordered a complete inventory to be filed, and that they include said property therein, by October 5, 1912. The executors in their representative capacity perfected their appeal to the circuit court but did not appeal as individuals. In the circuit court it was stipulated that the two causes should be tried and considered together and that the appeal case be treated as a petition for citation, under sections 81 and 82 of the Administration act, in proper form, and that both causes be referred to the master in chancery, and they were so referred in like manner as were the issues in the interpleader case. The master found and reported that the certificates of purchase were not the property of Christopher but were the property of the estate; that the redemption money aforesaid belonged to Michael Harrigan's estate and not to Christopher; that the county had no lien on the redemption money and was not entitled to it under the interpleader, and that the appeal of the executors, as executors, from the probate court should be dismissed, as they had no appealable interest, etc.

The county of Peoria filed objections and exceptions, and on the hearing before the court Christopher Harrigan,

as sole executor of the estate, Kate Harrigan being then dead, was made a party defendant to the bill of interpleader. He then filed a joint and separate answer, individually and as executor, in which he claimed the money and the certificates as his individual property and disclaimed having any interest therein as executor. The cause was then referred, the same evidence offered and practically the same report made by the master in chancery, and the objections and exceptions were again filed by the county of Peoria. The court sustained the master's report and his findings. He further found that it was the duty of the executor to have had appointed in the probate court, and also in the circuit court, an administrator *pro tem* to defend both of these suits, and that the estate of Michael Harrigan was the owner of the certificates of purchase and that the redemption money belonged to the estate; that no reason appeared for further action by the court, and that the interpleader case should be continued until the legal owner should appear and ask for a proper order for the money in the hands of the circuit clerk, and disallowed the claims of Christopher Harrigan and the county of Peoria to the certificates and the funds and dismissed from the suit the county of Peoria without prejudice to its rights in its claim probated in the probate court and pending on appeal in the circuit court, and gave judgment for costs against the county of Peoria and Christopher Harrigan, each to pay one-half. It further appears from the record that before final decree Louis Gauss, county treasurer and *ex-officio* collector of Peoria county, presented an intervening petition in the interpleader suit and asked to be made a party thereto, and sought thereby to claim the funds in dispute as tax collector for said back taxes. The court denied him leave to intervene, and he and the county of Peoria both perfected their appeals to this court. Christopher Harrigan individually and as sole executor has assigned cross-errors.

It is insisted on the part of the appellee assigning cross-errors that this appeal is improperly brought to this court because the revenue is not involved within the meaning of our Practice act. The question of revenue is involved when some recognized authority of the State or some of the municipalities authorized by law to assess and collect taxes are attempting to proceed under the law to collect the same and questions arise between them and those of whom taxes are demanded. (*Reed v. Village of Chatsworth*, 201 Ill. 480; *Wilson v. County of Marion*, 205 id. 580.) The revenue is also involved, within the meaning of said act, when the controversy is whether the funds in dispute belong to the revenue of the county or State or some division thereof. (*People v. Holten*, 259 Ill. 219; *People v. Hibernian Banking Ass'n*, 245 id. 522.) Some of the questions here are, has the county a lien on the fund by virtue of former proceedings to collect the taxes in question, is the county entitled to have it applied on its demand for taxes, and is it entitled to the fund as taxes; and it is a proceeding to collect or enforce its demand for such taxes. The revenue is involved.

The court properly held that Christopher and Kate Harrigan, as executors, could not appeal from the order and judgment of the probate court as that order and judgment were in favor of the estate. They did not appeal as individuals, and as such are bound by that order and judgment. The proceeding was one against them as individuals. A proceeding under sections 81 and 82 of the Administration act against an administrator is one against him individually when it is sought to have property inventoried that he claims in opposition to the estate he is administering. (*Martin v. Martin*, 170 Ill. 18.) The judgment in the probate court being against the executors as individuals, and not being appealed from by them as individuals, it is binding on them as *res judicata* whether this proceeding be considered as under section 81 or 82, aforesaid, or otherwise.

They could not change, by stipulation, the proceeding in the probate court to one under sections 81 and 82, and thus escape the binding force of the probate order and judgment, from which they had not appealed, as the court properly held.

The evidence in this record is overwhelmingly against the appellee assigning cross-errors even if the executors had the right to consider the probate case as appealed by them as individuals or if it be treated as a proceeding under section 81, and there is no theory upon which their claim as individuals can be sustained. The evidence clearly and conclusively shows that the property belonged to Michael Harrigan at the time he died. It appears therefrom that he had been a purchaser at tax sales over thirty years and had purchased a large amount of tax certificates every year. He loaned large sums of money, and at one time he owned over \$20,000 of valuable bonds besides his notes, etc. He was a lawyer by profession, conducted his business in the name of M. Harrigan, while his sister Maggie during his lifetime did business as Maggie Harrigan and deposited the money in her bank in that name. He conducted his business with the express purpose and intent to at all times keep his property covered up to avoid taxes, and to permit him at any time, at a moment's notice, to pass it to anyone else, or to his legatees and devisees in case of death, so that they could baffle the public authorities in collecting the legal demands for taxes and other claims. He kept no bank account subject to check, yet he carried large amounts in the banks, evidenced by certificates of deposit. All certificates of deposit, notes given him for loans, and tax certificates, were immediately indorsed in blank by him as "M. Harrigan,"—a convenient name that might be treated as his own name or as that of Maggie Harrigan, as best suited his or his legatees' purpose. The property in question, the tax certificates, were indorsed in the same way and were in his own safe when he died, as were also the notes inventoried

by the executors along with the tax certificates. When he took mortgages to secure loans he immediately executed release deeds, apparently so they could be recorded at any time thereafter, either by himself or by his executors after his death, so that the record would leave no trace against them when they collected his notes. His will was executed after the same fashion, apparently as a further instrument to baffle the public authorities in establishing and collecting their demands against him and his estate. It described no property specifically. It covered any property wherever the same might be found or located. He made two quit-claim deeds to his sister Maggie on September 27, 1911,—one to a tract of land and to all real estate that he owned or had tax deeds for in Tazewell county, and one to a lot in Peoria and to all other real estate that he owned or had tax deeds for in Peoria county, each being for a nominal consideration of one dollar and other valuable consideration. She is shown to have received a lot of notes from the testator's safe since his death, and since his death has adopted the plan of doing her banking business in the name of "M. Harrigan." The evidence further shows, clearly and conclusively, that his legatees and devisees and executors have since his death taken advantage of the testator's method of doing business to conceal, as far as possible, all the property left by him and to put every obstacle possible in the way of the county and the State finding out the property, and the amount thereof, that was owned by him at his death. Their individual testimony to the effect that they owned it all and it was theirs before the testator died is so unsatisfactory, so contradictory and so unreasonable that it cannot be relied on at all and has little or no probative force in their favor. In our view of the matter no useful purpose can be served in referring to it in detail or further discussing it. We have considered the evidence with great care, and our conclusion is that the finding of the court on the facts is well sustained on the issues in both cases.

The court also properly held that the county of Peoria had no legal claim by which it could hold the redemption money. Its claim is based on the theory that the tax assessments and the collector's warrants became a lien on the property in question and would continuously be a lien thereon until the taxes are paid. No lien ever attached to the tax certificates for said taxes. They were but choses in action. The words "personal property," employed in section 254 of the Revenue act, and the words "goods and chattels," used in section 137, are to be construed as having the same meaning and as comprehending only such personalty as may be made subject to levy and sale under an execution upon a judgment at law. They do not extend to personal property of the character in question,—tax certificates,—which are mere choses in action. The money in question was collected by the clerk on such certificates and was never in the possession of the deceased so as to be impressed with a tax lien. (*Loeber v. Leininger*, 175 Ill. 484.) The power of the collector is to demand and receive pay or enforce a lien on his warrant. If payment is not voluntarily made to him and he has no lien he has no further authority to institute an action to recover the amount of the taxes. (*Loeber v. Leininger*, *supra*.) The court properly refused to allow the collector to intervene.

The court also properly held that the county of Peoria could not hold the fund upon the theory that the interpleader suit was, in effect, a creditor's bill to reach assets, etc. There is no judgment upon which a creditor's bill can be based. Appellants' claim that the estate is insolvent is not sustained by the proof. In such a case, in a proceeding by a creditor's bill against an estate, there must be a judgment or the estate shown to be insolvent or a bill can not be maintained. *Steere v. Hoagland*, 39 Ill. 264; *Garvin, Bell & Co. v. Stewart's Heirs*, 59 id. 229.

It appeared from the evidence in the case that the county filed its claim for taxes in the probate court and that its

claim was allowed in the sum of \$4801.13 and that the executor of the testator took an appeal to the circuit court. A number of questions have been raised by appellants as to the validity of the appeal bond, and by appellees on the question of the right of the county to have a claim allowed for taxes in the probate court against the estate of the deceased. None of those questions are pertinent to the issues in this case. It appears that the appeal is still pending in the circuit court, and it is even said by the county collector that the appeal case has not been docketed in the circuit court. All such questions are only proper for consideration on the hearing of that case, as their determination is not before this court as an issue in the court below. The court properly held that the appeal is still pending, regardless of any irregularities in the appeal bond.

The court erred in its conclusion that it was necessary that an administrator *pro tem* should have been appointed before final disposal of the case. Such an appointment is not authorized where the executor claims property as his own in opposition to the estate he represents. (*Day v. Bullen*, 226 Ill. 72.) It was not necessary to have such an administrator appointed in the probate court case. Such a case proceeds just as well without the appointment of such an administrator as with it. No administrator is necessary in any such case where there is already an administrator or executor duly appointed. (*Emerick v. Hileman*, 177 Ill. 368.) The statute authorizes such an appointment, under section 72 of the Administration act, only where the administrator or executor files an out-and-out claim against the estate. The sole executor in this case had entered his appearance herein, and the court found that the property in question was property belonging to the estate. The proper course, in the first place, was to strike his disclaimer from the files. A disclaimer is a mode of defense. If it prevails the defendant must be dismissed, and, as a general rule, he will have a right to be dismissed with costs. If

a defendant attempts to disclaim in a case where his disclaimer does not entitle him to a dismissal but he must, notwithstanding his disclaimer, still be retained as a party defendant in order that the subject matter of the case be finally disposed of, he should be retained in the suit and his disclaimer stricken. The disclaimer in this case simply amounts to an obstruction to the remedy of the complainant in this case to have the funds finally disposed of. He was entitled to a final decision of this case and to a final disposition of the funds in controversy, and the court erred in not so holding. (*Alley v. Adams County*, 76 Ill. 101.) The disclaimer being a mere obstruction to this end, the court, of its own motion, should have stricken it from the files. (*Isham v. Miller*, 44 N. J. Eq. 61; 6 Ency. of Pl. & Pr. 722.) We think the court should also have dismissed the appeal of the executors from the order of the probate court commanding them to inventory said property, etc.

The order of the circuit court, in so far as it held that the appellants and Christopher and Kate Harrigan had no interest in the property in question and entered a final decree against them, is affirmed without prejudice to the said county in prosecuting its claim for taxes against said estate, but the other part of the decree is reversed and the cause is remanded, with directions that it dismiss the appeal from the probate court, strike the disclaimer of the executor from the files and that it enter a decree herein holding that the property is the property of the estate of Michael Harrigan, deceased, and that the clerk of the court be directed to pay the same to Christopher Harrigan as sole executor, and that said executor hold said funds as the property of the estate of Michael Harrigan, to be paid out by him in due course of administration of the estate, and that the appellant the county of Peoria and Christopher Harrigan pay all the costs in the court below individually, one-half each.

Reversed in part and remanded, with directions.

(No. 12524.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. WILLIAM DARE, Plaintiff in Error.

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. CRIMINAL LAW—if killing is proved defendant must prove circumstances in justification. Where a defendant is indicted for murder and the evidence clearly shows that he committed the homicide the burden is upon him to show circumstances in justification of his act, and the weight to be given such evidence is for the jury.

2. SAME—when instruction that calling foul names will not justify attack is proper. It is not improper in a murder trial to instruct the jury that calling foul names does not justify an attack, where the defendant, according to his own testimony, had been called foul names by the deceased a few minutes before the fatal encounter, though he did not assault the deceased for that reason.

3. SAME—certificate of judge is only proper method of showing what took place in his presence. An assignment of error that the court erred in overruling a peremptory challenge during the examination of the jurors cannot be considered where the bill of exceptions contains no certificate of the judge as to what actually took place, as this is the only way of showing what the judge does or what occurs in his presence.

WRIT OF ERROR to the Circuit Court of Peoria county;
the Hon. T. N. GREEN, Judge, presiding.

J. FRANK LASLEY, and SCHOLES & PRATT, for plaintiff
in error.

EDWARD J. BRUNDAGE, Attorney General, C. E. McNEMAR, State's Attorney, EDWARD C. FITCH, and GEORGE A. SHURTLEFF, for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

On August 27, 1917, in the Lehmann building, in Peoria, William Dare stabbed and killed Herman Schwarz. He was indicted for murder and convicted of manslaughter and has sued out a writ of error to reverse the judgment.

The Lehmann building was an office building in process of construction, parts of it having been completed and occupied by tenants. A room in the basement designed as a bar-room had been let and possession had been given to the tenant. The doors were finished in mahogany, and the contractor who was putting in the bar fixtures and wainscoting for the tenant was changing this finish to silver-gray. In this work he employed a young man, Fred Rothan, who was not a member of the Painters' Union, to remove the varnish, using a paint brush and varnish remover. Plaintiff in error was the business agent of the Painters' Union, and on the morning of the homicide went to the building and endeavored to get Rothan to join the union but without success. Schwarz was the foreman of the sub-contractor for the painting and Dare went to an upper floor of the building where he saw Schwarz, and as a result of the interview Rothan quit the work of removing the varnish. Later Rothan returned to work, using a rag instead of a paint brush, and about two o'clock Dare returned to the building and finding Rothan at work went to the fourth floor and had another interview with Schwarz, which resulted, as Dare testified, in his saying to Schwarz, "I gave you this morning until twelve o'clock to get this matter settled, and now at five o'clock, if you don't get this matter adjusted, I will have to take the men off this job." As Dare turned to leave Schwarz said, "I will tend to my business," and Dare replied, "I will fix you." Dare went down to the bar-room and Schwarz immediately followed him, arriving at almost the same time. The elevators in the building go down to the basement. North of and immediately in front of the elevators is a corridor about ten feet wide, running east and west. At the east side of the elevators a stairway leads up from the basement, and a little further to the east, at the end of the corridor, is a door leading into the bar-room. At the west end of the corridor is a door leading into a pool-room, and a stairway by the side

of this door leads to the sidewalk on the street. The bar-room and pool-room lie north of the north wall of the corridor and are separated by a partition extending north from the north wall of the corridor, in which, at some distance from the south end, is a door between the two rooms. There were window openings in the wall between the corridor and the bar-room but at the time of the homicide the windows were not hung. Schwarz and Dare met in the bar-room and a quarrel occurred between them. J. W. Elmore, the business agent of the Carpenters' Union, and Frank Dougherty, were present and were with Dare and Schwarz at the time and others were in the room. Elmore testified that the first remark he heard was, "I am running this business," made by Schwarz, to which Dare replied, "I am taking care of my part of the business, too." Then Dare hit Schwarz in the face with his fist. Schwarz went through the door into the pool-room and returned with an iron bar raised above his head, going toward Dare, but he was stopped by those present, who took the bar away from him, and Schwarz then said, "I will prefer charges against you." Dare testified that he struck Schwarz because of the foul and obscene names which Schwarz applied to him, and one of the witnesses testified to the use of such words but the other witnesses did not hear any such language. After the iron bar was taken from him Schwarz left the bar-room through the door leading into the pool-room and went around through the pool-room to the door at the west end of the corridor, through which he entered the corridor about the same time that Dare came into the corridor at the other end from the door leading into the bar-room. Schwarz went east toward the stairway leading to the upper floor and Dare went west toward the stairway leading to Main street. Two janitors were at work in the corridor baling paper. They saw Schwarz come into the corridor but saw nothing in his hand. They went on with their work. There was a short scuffle which they heard

but did not see. They turned and saw Schwarz backing away from Dare and facing west, with his hands to his side, and heard him say, "My God! That man has got a knife and cut me!" He backed through the door into the bar-room and fell, saying, "See the man with the knife in his hand! He stabbed and killed me!" A witness testified that Dare was standing in the corridor with his hat off and the knife in his right hand. The weapon called a knife was a long, slender paper knife used for opening letters, which Dare was carrying in his inside coat pocket. It was found after the accident lying on the floor, with blood on it. Charles W. Keys, a painter, testified that a short time before Dare had shown him a knife similar to the one in evidence, saying that he was "fixed for the next [using an opprobrious term] that jumps me." Schwarz was carried to a physician's office on the tenth floor of the building, where he died in a few minutes.

Dare testified that after he had taken two or three steps down the corridor Schwarz made a jump toward him, calling him by a foul name, and grabbed him and commenced pressing him back over a crate that was there, with his head against the wall; that Dare felt the knife in his pocket prick his arm and presumed that he got it; that he had no intention of killing Schwarz; that it didn't enter his mind; that he thought Schwarz had a brick in his hand and he was afraid of him; that Schwarz backed him, pushed him over, twisting him around until he was facing the other way and went away from him over to the door, and when he got in the door faced him, saying, "See! He has got a knife!" that then Schwarz turned and walked into the door and Dare turned and walked outside.

There was evidence as to Dare's actions and statements to the policeman when he was arrested and when he was in the office of the chief of police, but they are not essential to be referred to here.

The plaintiff in error argues that the verdict was clearly against the weight of the evidence; that he was not guilty of manslaughter, but the case was one either of willful murder or self-defense. If it was a case of willful murder plaintiff in error cannot complain that he was found guilty only of manslaughter, so that part of the argument may be disregarded. The court will interfere with a verdict of guilty only where there is clearly a reasonable and well founded doubt of the defendant's guilt. Whether the circumstances are such as to raise such reasonable doubt it is the special province of the jury to determine. It was clearly shown that Dare killed Schwarz, and the burden therefore devolved upon him to show circumstances that mitigated the act or justified or excused it. Even if his account of the homicide, if true, might have excused him, yet the credit to be given to his account was for the jury to determine under all the facts and circumstances in the case, and their verdict cannot be set aside because not sustained by the evidence.

Objections are made to various instructions given to the jury. It is claimed that instruction No. 20 was misleading because it instructs the jury that mere words or names would not justify an assault, while it was not claimed that the plaintiff in error attacked the deceased in the corridor because of being called names by the deceased. The plaintiff in error, according to his testimony, had been called foul names by the deceased a few minutes before they met in the corridor, and it was not improper to tell the jury that this fact would not justify an attack on the deceased. The objection that the instruction ignores the theory of the defense is not valid, for it contains the condition that before a verdict of guilty can be rendered it must appear that the action of the defendant was not in self-defense.

Instruction No. 21 is based upon the hypothesis that the first trouble between Schwarz and Dare was over and that Dare made a new attack upon Schwarz, and objection

is made that it does not take into consideration that Dare claimed that Schwarz made the second attack on him. But the objection is not well founded, for the instruction contains the express requirement that the jury believe from the evidence, beyond all reasonable doubt, that Dare without any further provocation made an attack upon Schwarz with intent to kill him.

It is argued that there was no evidence on which to base instruction No. 22, in so far as it submitted to the jury whether Dare armed himself with the paper knife with intent to use it on Schwarz, and that the evidence clearly shows there was no such intent. The instruction was justified by the testimony of Keys that Dare exhibited the weapon, saying he was "fixed" for the next one that jumped him, by Dare's own statement that he told Schwarz he would "fix" him, and by the testimony of another witness that immediately after striking Schwarz in the bar-room Dare had his hand on his inside coat pocket, where the knife was. This answers also the substantially similar objection made to instruction No. 23.

A general objection is made to instruction No. 24 that it is misleading, confusing and prejudicial and sets out certain facts which were not in evidence. Our attention is not called to any special thing in the instruction to which this criticism applies, and though a part of it, because of an apparent omission of some words, is insensible, it contains nothing by which the jury could have been misled or the plaintiff in error prejudiced.

Included among the reasons for a new trial was one that the court erred in overruling the peremptory challenge of the defendant to the juror Zeigler although the defendant had still six unused peremptory challenges. In support of this reason the plaintiff in error presented the affidavits of himself and his attorneys as to what took place during the examination of the jurors while the jury was being empaneled. Affidavits in opposition were filed by the State's

attorney and his assistants. The bill of exceptions contains no certificate of the judge as to what actually did take place, and this is the only way of showing what the judge does or what occurs in his presence. (*People v. Capello*, 282 Ill. 542.) This assignment of error, therefore, cannot be considered.

The judgment will be affirmed. *Judgment affirmed.*

(No. 11927.—Decree affirmed.)

MARY A. McCUNE *et al.* Plaintiffs in Error, *vs.* RAYMOND A. REYNOLDS *et al.* Defendants in Error.

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. TRIAL—*on motion to instruct for defendant the evidence is to be taken most strongly in favor of plaintiff.* A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff.

2. WILLS—*what is undue influence.* Undue influence is any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do something he would not do if left to act freely.

3. SAME—*burden is on the contestant to prove charge of undue influence—fiduciary relation.* The burden rests upon the contestant to prove the charge of undue influence, and the mere fact that beneficiaries in a will stand in a fiduciary relation to the testator does not put upon them the burden of showing an absence of fraud and undue influence, where there is no evidence tending to show that they were instrumental in procuring the execution of the will.

4. SAME—*what question is presented on motion to withdraw issue from jury.* In a will contest case, on a motion to withdraw the issue of undue influence from the jury, the question presented is whether there is any evidence fairly tending to prove that issue.

5. SAME—*admissions of one devisee as to acts of undue influence not admissible where devisees have separate interests.* In a will contest case, statements or admissions made by a devisee con-

cerning the testamentary capacity of the testator or acts of undue influence in procuring the execution of a will, while admissible in evidence where the interest of all the devisees is joint, are not admissible where the interests of the devisees are separate.

6. *SAME—when interests of devisees are not joint.* The interests of devisees under a will are not joint unless joint tenancy, and not tenancy in common, is expressly declared, and the act abolishing joint tenancies applies to personalty as well as to realty.

7. *SAME—when error in holding court at home of a witness is harmless.* Courts have no authority to exercise their functions in any place except that provided by law, but in a will contest case, where the only issues raised are those of testamentary capacity and undue influence, error in holding court at the home of one of the attesting witnesses who was unable to attend the hearing is harmless, where there is in the record abundant evidence, aside from that of said attesting witness, to sustain the finding of the jury.

8. *SAME—when attesting witness need not be called in suit to contest will.* On the contest of a will by bill in chancery, when the execution and probate of the will are admitted by the bill and the only issue is the soundness of mind of the testator, it is not essential that the subscribing witnesses shall be called to prove either the due execution of the will or the testamentary capacity of the testator.

9. *SAME—when testimony as to contents of former will is not admissible.* In a will contest case, testimony regarding the contents of a former will is not admissible where the terms of such will are variant from the will in suit.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding.

GEORGE F. ORT, (R. W. E. MITCHELL, and FRANK W. JOSLYN, of counsel,) for plaintiffs in error.

STAGER & STAGER, and MCCALMONT & RAMSAY, for defendants in error.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause comes on a writ of error to the circuit court of Whiteside county to reverse the decree of that court dismissing the bill filed by Mary A. McCune, one of the plaintiffs in error, to set aside the will of Chauncey W. Reynolds,

deceased. The bill as amended charges undue influence on the part of the testator's three sons and want of testamentary capacity on the part of the testator, and makes Walter D. Reynolds, Raymond A. Reynolds and Chauncey W. Reynolds, Jr., his sons, and Gertrude Morley and Beatrice O. Morley, grand-daughters, defendants. Mary A. McCune is a daughter of the deceased. The will was executed in 1902 and devises the real estate in part to the three sons and the balance to the executors to pay legacies to the grandchildren and gives the residue of his property to his sons. The eighth clause of the will provides as follows: "Having already advanced and deeded to my daughter, Mary A. McCune, property that is now of greater value than that herein willed to either of my said sons, it is my will that she receive nothing whatever from my estate." The case was heard before a jury. At the close of the contestants' testimony the chancellor, on motion of proponents, withdrew from the jury the issue of undue influence on the ground that the contestants' evidence did not tend to support such allegations of the bill and instructed the jury accordingly. The only remaining controverted question to go to the jury was that of the testamentary capacity of the testator. The jury returned a verdict sustaining the will.

The questions involved in this cause arise on the assignments of error on the part of the chancellor in withdrawing the issue of undue influence from the jury, error in receiving and rejecting testimony, the granting and refusal of certain instructions, and that the verdict of the jury was against the manifest weight of the evidence.

A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. (*Geiger v. Geiger*, 247 Ill. 629; *Lloyd v. Rush*, 273 id. 489.) Undue influence has been defined to be "any improper or wrongful con-

straint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." (*Smith v. Henline*, 174 Ill. 184.) The burden rests upon contestant to prove the charge of undue influence. This cannot be done by the establishment, alone, of a fiduciary relation existing between the testator and the beneficiaries. The mere fact that beneficiaries in a will may stand in a fiduciary relation to the testator does not put upon them the burden of showing an absence of fraud and undue influence, where there was no evidence tending to show that they were in any way instrumental in procuring the execution of the will. (*Lloyd v. Rush*, *supra*; *Bauchens v. Davis*, 229 Ill. 557.) "Undue influence that will avoid a will must be directly connected with the execution of the instrument and be operating when the will is made. (*Wickes v. Walden*, 228 Ill. 56.) It must be influence specially directed toward procuring the will in favor of particular parties, and be such as to destroy the freedom of the testator's will and render the instrument obviously more the offspring of the will of others than of his own." (*Snell v. Weldon*, 239 Ill. 279; *Lloyd v. Rush*, *supra*; *Bowles v. Bryan*, 254 Ill. 148.) The question presented on a motion to withdraw an issue from the jury, as in this case, is whether there is any evidence fairly tending to prove the issues involved. *Yess v. Yess*, 255 Ill. 414.

The evidence of the contestants shows that the testator made his home with one of his sons, Raymond, after the death of his wife, which occurred prior to 1900. He had a room up-stairs, which he had himself furnished. Adin McCune, a son of Mary A. McCune, testified to visits paid by him to the testator at the home of the son, Raymond; that the testator would close the door to his room while the witness was there; that he complained that since his wife died "the place did not seem like home;" that Raymond and his wife acted as though they didn't want him there;

that witness had seen acts of disrespect, which he describes as indicating that the testator lived in fear of his children; that testator frequently cried when talking to him of family affairs, especially when talking of his deceased wife. Witness does not give the dates of these conversations or visits, though it appears from his testimony that a part of the incidents testified to occurred during the year in which the will was made.

Richard A. Morley, husband of a deceased daughter of testator, testified to various conversations with the testator and with Raymond. The evidence of conversations with said son was objected to on the ground that the statement of one heir could not bind the rest of the heirs. On statement of counsel for contestants that it would be shown that the other two sons made substantially the same statement and were cognizant of the statement made by Raymond, the court permitted the evidence to go in, with the ruling that it would be stricken if not connected up. Morley, on the same statement of counsel and ruling of the court, testified that on one occasion shortly after the death of the testator's wife, Raymond asked witness to request his (witness') wife to urge the testator to move in with him (Raymond); that it would not do to have complainant move in with testator, and he asked that a conference be arranged with the testator to that end. Witness also testified to a conversation at this conference between Raymond and the testator in which the former urged his father to make his home with him, saying complainant had too many children and that if he moved in with her it would end in trouble. Witness testified to a conversation with Raymond the following day in which he said: "It is to our interest to keep Minn [complainant] out of there; with Walt on the farm and Minn in the house here there won't be anything left for the rest of us." Witness also testified to conversations with the sons Raymond and Walter, in which they declared that their sister had received all that she was entitled to,

and more, too, from her father, and that Walter told his father so. Witness also testifies to a conversation with Raymond in August, 1902, about a month before the making of the will in question, when the latter was complaining about complainant having received her mother's watch, in which conversation he said: "She is welcome to it, but I will see to it that it is the last thing,—the last article of mother's,—she ever gets from him, and she will never get another dollar of our father's estate." Witness also testified that the testator appeared nervous when discussing his family affairs and at times showed fear of his sons and at times an unfriendly attitude toward them. On withdrawing the issue of undue influence from the jury the chancellor, on motion of proponents, struck from the record this testimony on the ground that there was no evidence connecting the other sons with such statements or the purpose evidenced thereby, as counsel for the contestants had stated would be done, and on the further ground the statements of one are not admissible as binding on the others without being so connected up. This ruling is assigned as error.

There is no charge that said sons conspired with one another to use the undue means charged by the bill to have been used by each of them. The rule is that statements or admissions made by a devisee concerning the testamentary capacity of the testator or acts of undue influence in procuring the execution of a will, while admissible in evidence where the interests of all the devisees are joint, are not admissible where the interests of the devisees are separate. *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 id. 612; *Boyle v. Boyle*, 158 id. 228; *Dowie v. Driscoll*, 203 id. 480.

In the case of *McMillan v. McDill*, *supra*, cited in the later cases on the subject, the testator devised his property in equal shares to certain persons. In the bill to contest the will all devisees were made parties defendant, and on the hearing contestants were allowed, over objections of the

defendants, to prove declarations of different ones of the devisees to the effect that the testator did not have mental capacity to make a will. The court, however, ruled that the declarations of each devisee were admissible against him but not against the co-defendants. In that case this court said: "In the case under consideration, the court, in deciding the question, admitted the declarations only as against the party who made them. But this did not relieve the evidence of its injurious effect. The evidence was admitted upon the issue involved in the case. It was incompetent as against the other defendants, and as it could not affect the issue without affecting the other defendants, it was, in our judgment, incompetent to go to the jury on the issue involved. If the interest of the devisees had been joint the evidence might have been admitted against all of them, as we understand it to be a rule of evidence where the parties have a joint interest in the matter in suit an admission made by one is in general competent evidence against all. But here the devisees did not have a joint interest under the will but they had separate interests in one subject,—the validity of the will,—as held in *Dietrich v. Dietrich*, 1 Pen. & Watts, 306. If this was a case where a judgment could be rendered against one of the defendants without affecting the rights of the others there might be some ground for admitting in evidence the declarations as against the defendant who made them. But such is not the case. The only question here is as to the validity of the will, and testimony which defeats one defendant—one devisee—defeats all, and a judgment against one necessarily defeats all. While it might be proper to defeat a will on the admissions of a party who was a sole devisee, it would be manifestly unjust, where there are several devisees, to suffer the rights of all to be concluded and swept away by the admissions of one, and these admissions made in their absence and without their knowledge or sanction. If the admissions here could have gone to the jury and affected the rights of

none but the one making them no error would have been committed. But such was not the case. The admissions, notwithstanding the ruling of the court, went to the issue *devisavit vel non*, in which all the devisees were equally interested."

In the case of *Campbell v. Campbell*, *supra*, certain witnesses testified to statements made by devisees as to what they had done to influence the testator in making his will. This court there said: "In no view could the evidence of the declarations of Campbell be received against anyone but himself, since the interests of appellees are in common and not joint; but to admit the evidence upon the issue in this case for any purpose would affect the interests of all claiming under the will, and we have therefore held in an analogous case it is not admissible at all."

Joint tenancies have been abolished in this State since the act of 1821, entitled "An act concerning partitions and joint rights and obligations." This act as it is preserved in the present law applies to personalty as well as to realty, (*Hay v. Bennett*, 153 Ill. 271,) except where joint tenancy and not tenancy in common is expressly declared in the conveyance of real estate, as provided in section 5 of the Conveyance act. (*Mette v. Feltgen*, 148 Ill. 357.) The interests of the devisees under this will were not joint, and the testimony of the statements referred to was properly stricken from the record. There was no evidence fairly tending to prove the issue of undue influence, and the chancellor did not err in withdrawing the same from the consideration of the jury.

The record contains much testimony on the issue of the testamentary capacity of the testator. Contestants offered the testimony of eight witnesses on the issue of testamentary capacity. George James, Charles Detra and Robert S. James testified that they were for years neighbors of the testator; that at times he was sociable and at times would pass them on the road without speaking and apparently

without seeing them. None of them testified that in their judgment he was not mentally capable of making a will. L. J. Lively, a traveling salesman, testified, in effect, that he lived near the testator; that he spent most of his time away from home; that at times testator would speak to him and at times he would not; that he had had no lengthy conversations with him; that he had observed his appearance in a casual manner; that he considered the testator hardly a normal man. This witness gave no other opinion touching the testamentary capacity of the deceased. Jane Lane, another neighbor, testified that she had known the testator since he moved into Morrison, about 1895; that she did not see him very often; that she sometimes saw him sitting on the porch or leaving the house; that he seldom talked to anyone. This witness gave as her opinion that he was weak in mind and body but did not testify further as to an opinion of his testamentary capacity. Richard A. Morley, son-in-law of the testator, testified to frequent visits and conversations with him and that in his judgment he was not capable of making a will. On cross-examination he admitted that he felt an interest on behalf of the complainant and that he assisted her in securing counsel in the case. Adin McCune testified as before set out and that in his opinion the testator was not mentally capable of making a will. The testimony of Cora McCune, wife of Adin McCune, was to the same effect.

The proponents offered the testimony of thirty-nine witnesses, including men and women from many avocations of life, who had known the testator for periods varying from ten years to the life of the witness and some for the life of the testator. Most of them had seen him frequently and many of them testified to conversations or business transactions with him. All of these witnesses testified in legal effect, and many of them in terms, that in their opinion the testator was of sound mind and memory at the date of the execution of his will.

We have examined the evidence in this case and are of the opinion that the chancellor was justified in finding that the testator was of sound and disposing mind and memory when the will was executed. It appears from the evidence that he was eighty-one years of age at the time of his death, which occurred in 1916. In his more vigorous years he was a stern and at times a taciturn man. He was a successful farmer and accumulated considerable property. After retiring from his farm he continued to personally attend to the renting of it and to transact his various affairs and business. This continued to be true up to the time of his last illness. While there is evidence in the record that during the latter years of his life his memory was at times poor, that he was at times nervous and appeared melancholy after the death of his wife, yet the overwhelming weight of the testimony supports the finding on the issue of testamentary capacity.

The contestants also assign as error the removal of the court to the home of the witness Woodford during the trial for the purpose of taking the testimony of said witness, he being ill and unable to attend the hearing. It is insisted that such a proceeding is *coram non judice* and void, and that as Woodford was one of the subscribing witnesses to the will his testimony was essential to the proponents' *prima facie* case as to its validity, and that since the testimony of Woodford and the proceedings in taking the same were void, the record contains the testimony of but one subscribing witness to the will. It appears from the record this testimony was so taken by the express agreement of counsel as shown by a stipulation in the record, it being stipulated that no advantage would be sought by or objection raised to such proceeding. While courts have no authority to exercise their functions in any place except that provided by law, (*People v. McWeeney*, 259 Ill. 161,) yet in this case there was no objection to the validity of the will nor its introduction in evidence on the ground of want of proper

execution or lack of proof thereof, nor was such an issue raised on the pleadings. This is not a proceeding to probate a will but to set aside a will probated. On the contest of a will by bill in chancery when the execution and probate of the will are admitted by the bill and the only issue is the soundness of mind of the testator, it is not essential that the subscribing witnesses should be called to prove either the due execution of the will or the testamentary capacity of the testator. (*Graybeal v. Gardner*, 146 Ill. 337.) Here the bill of the contestants admits the execution of the will and its admission to probate. The only issues raised were those of testamentary capacity and undue influence. The testimony of Woodford was not essential to make a *prima facie* case. There was in the record abundant evidence, aside from that of Woodford, to sustain the finding of the jury. It follows that the error complained of was a harmless one.

Various errors are assigned as to the ruling of the chancellor on the admissibility of evidence, the main contention being that the court erred in refusing testimony offered by contestants of the contents of a former will of the testator. From the statements of counsel in connection with the offer of said testimony it is apparent that the terms of said will were variant from the will here in question. Testimony regarding the contents of a former will is not admissible where the terms of such will are variant from the will in suit. (*Roe v. Taylor*, 45 Ill. 485; *Pilstrand v. Swedish M. E. Church*, 275 id. 46.) The chancellor did not err in refusing this testimony.

Error is also assigned as to the rulings of the chancellor in the giving and refusing of certain instructions. We have examined said instructions together with all instructions given and are of the opinion that the jury were fully and fairly instructed.

There being no reversible error in the record the decree of the circuit court will be affirmed. *Decree affirmed.*

(No. 12527.—Judgment affirmed.)

HUGO ALBERT WESKALNIES, Plaintiff in Error, vs. JOHN F. HESTERMAN, Sheriff, Defendant in Error.

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. SALES—*when Bulk Sales act of 1913 applies to sale of farm implements.* The Bulk Sales act of 1913 applies where a vendor, who is engaged in farming and dairying on a rented farm, sells, in bulk, to his son all of the live stock and the agricultural and other implements used on the farm, and if no attempt was made to comply with the Bulk Sales act the sale is void as to creditors.

2. DEBTOR AND CREDITOR—*when sheriff is not required to wait ten days before levying execution.* A levy of execution is not void because it is made less than ten days after execution is issued, where the judgment debtor is notified of the execution and has made a purported sale of the property to his son, who is about to sell it at auction.

3. SAME—*levy of execution does not deprive debtor of right to make schedule within ten days.* Levying an execution on personal property before the expiration of ten days after the execution is issued does not deprive the judgment debtor of his right to schedule his property and claim his exemptions within the ten days.

4. PRACTICE—*right of defendant to make plaintiff his witness on cross-examination rests in discretion of court.* In an action of replevin, where the plaintiff testifies in his own behalf, the right of the defendant to make the plaintiff his witness during cross-examination and to examine him rests in the discretion of the court.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DuPage county; the Hon. MAZZINI SLUSSER, Judge, presiding.

BUNGE & HARBOUR, for plaintiff in error.

JOSEPH A. REUSS, WILLIAM R. FRIEDRICH, and MIGHELL, GUNSUL & ALLEN, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

The Appellate Court for the Second District affirmed a judgment of the circuit court of DuPage county for defendant in an action of replevin. On the petition of plain-

tiff this court granted a writ of *certiorari*, and the record is brought here for review.

The undisputed facts are that the father of plaintiff in error, Albert Weskalnies, was engaged in the business of farming and dairying on a rented farm of 165 acres in DuPage county. He raised grain, hogs and horses and kept fifteen milk cows. He shipped the milk daily to Chicago. His son, Hugo Albert Weskalnies, plaintiff in the replevin suit and plaintiff in error here, lived with his father and worked for him on the farm from January, 1916. Plaintiff was thirty-three years old. On November 18, 1916, the plaintiff's father executed a bill of sale to him for all the property on the farm except household furniture and 40 acres of corn in the shock, for the expressed consideration of \$2873.50. The bill of sale purported to evidence a sale to plaintiff from his father of fifteen cows, one bull, one boar, one sow, seventeen shoats, six horses, three colts, and a large number of various kinds of agricultural and other implements used on the farm. It embraced all the live stock and farm machinery used on the farm. The bill of sale was recorded in the recorder's office the day it was dated. On December 14, 1916, William Ehrhart, a creditor of Albert Weskalnies, obtained a judgment against him in the circuit court of DuPage county for \$890.50 and costs. Execution was issued and delivered to the defendant, as sheriff of DuPage county, the same day the judgment was rendered, and on the 21st of December he levied on the property as the property of Albert Weskalnies. Thereupon plaintiff, Hugo Albert Weskalnies, replevined it from the sheriff, claiming he had bought it from his father and that it belonged to him. He had advertised the property for sale at public auction the day it was levied upon. After much effort and labor the issues were finally joined and the cause heard by jury. It was stipulated during the trial that the only property involved in the suit was the live stock. At the conclusion of all the evidence the plaintiff's

counsel moved the court to instruct the jury to find the issues for the plaintiff and that the right of property in the live stock (describing it) and possession thereof were in him. The court denied the motion. Thereupon counsel for defendant moved the court to instruct the jury to find the right of property and right of possession of the live stock to be in defendant, describing in the motion fifteen cows, one bull, one boar, one sow, seventeen shoats, six horses and three colts. The motion was allowed, and the court instructed the jury to find the issues for the defendant and that the right to possession of the live stock (describing it) was in defendant. The jury returned a verdict finding "the ownership and right of possession" of the live stock (describing the same live stock in the same manner it was described in the instruction) were in defendant. Motion for new trial was overruled, and the court rendered judgment that defendant have and retain the property replevined by virtue of the writ and that he recover his costs.

No real effort appears to have been made by defendant to prove that no consideration was paid for the property by plaintiff. The only testimony we find in the abstract which has any bearing on that question is the testimony of plaintiff himself, who testified he was thirty-three years old, and that from 1906 to 1910 he had worked for his father on another farm for \$300 per year. Whether he had been paid for his services is not shown. He worked for his father on the farm he was living on in 1916 from January to the time the bill of sale was made, but what, if anything, he was to be paid for his work is not shown. The circuit court and the Appellate Court held that the sale was fraudulent and void because it was made in violation of the act of 1913 called the Bulk Sales act, and plaintiff contends this was erroneous; that said act does not apply to one engaged in farming but applies only to those engaged in the business of selling merchandise, commodities and other wares; that the property sold by Albert Weskalnies was

the tools and instrumentalities used in conducting his farming operations and the Bulk Sales act does not apply in such case. No attempt was made by Albert Weskalties to comply with the Bulk Sales act, and if the act applied to him, then the sale of the property to plaintiff was fraudulent and void as to creditors. The first Bulk Sales act in this State was passed by the legislature in 1905. (Laws of 1905, p. 284.) That act was expressly limited in its application to the sale of stocks of merchandise, and in *Off & Co. v. Morehead*, 235 Ill. 40, it was held unconstitutional. It was pointed out in that case that the act did not apply to farmers, hotel keepers, livery or transfer companies, publishers, mine owners and others mentioned, and the court held that there was no reason or qualification connected with a stock of merchandise, or persons dealing in the same, which authorized the legislature to mark it or them for special protective legislation from which all other classes of persons and property were excluded. In 1913 the legislature passed another Bulk Sales act. (Laws of 1913, p. 258.) That act declares fraudulent and void as against creditors "the sale, transfer or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business," without compliance with the provisions of the act. Section 3 provides that the act shall include corporations, associations, co-partnerships and individuals who are parties to any sale of goods in bulk, but not to sales by executors, administrators, receivers, trustees in bankruptcy or by any public officer under judicial process, nor to the sales of exempt property, nor to sales made in the ordinary course of trade and in the regular and usual prosecution of the vendor's business, nor to sales made in good faith at public auction when notice is published in a newspaper of general circulation in the county where the

sale is made, ten days before the sale, or by posting notices in five public places ten days before the sale. That act was held valid in *Johnson Co. v. Beloosky*, 263 Ill. 363. The court said: "It must be assumed that the legislature, in passing the new act, had before it the decision of this court holding the former act unconstitutional because it was special class legislation, and that it was the intention of the General Assembly in passing the later act to obviate this objection by passing a general act applicable indiscriminately to the sale of any goods and chattels in the manner inhibited by section 1 of said act. Construing the new act as a general law which prohibits the sale of any goods and chattels in bulk, otherwise than in the ordinary course of trade in the regular and usual prosecution of business, the objection to which the former statute was open is obviated." It seems very clear from the history of the legislation and the language of the act that it was intended to, and does, apply to the sale of the property made by Albert Weskalnies to plaintiff. It was a sale in bulk of the major portion of the vendor's property, and was not made "in the ordinary course of trade and in the regular and usual prosecution of the vendor's business." There was no error in the holding of the circuit and Appellate Courts that the sale was fraudulent and void as to creditors.

Plaintiff also contends the levy of the execution on the property was void because it was made less than ten days after the execution was issued and received by the sheriff. It is conceded the judgment debtor was notified of the execution, although the printed notice to him was not signed by the sheriff. The point relied upon by plaintiff as rendering the levy void is that it was made seven days after the execution was issued, whereas the statute gives a judgment debtor desiring to avail himself of the benefits of the personal property exemption allowed him, ten days after notice of execution to make and deliver a schedule of his personal property to the officer having the execution. This

position of plaintiff is untenable. In the first place, the judgment debtor, so far as this record shows, never desired or intended to claim his exemptions out of the property in controversy. He denied it was his property, and, of course, he could not claim his exemptions out of the property without claiming to own it. He had made a purported sale of it to plaintiff, who claimed it as his and had published notice of his intention to sell the property at public auction the day the levy was made. Under the circumstances the sheriff was not required to await the expiration of the ten days before levying the execution when he knew the property would be sold and disposed of before that time. Further, the levying of the execution before the ten days expired would not operate to deprive the judgment debtor of the full period allowed by law to make and present his schedule. He would have a right to the ten days to make and present his schedule, and if levy was made before the expiration of that time he could present his schedule after levy and within the ten-day period. The levy before that time could not deprive him of the right to claim his exemptions if he desired to do so. Here the judgment debtor did not desire to claim his exemptions out of the property in controversy, because he claimed it was not his property. This was known to the sheriff, who also knew if the property was not levied upon the day the levy was made it would be sold and disposed of by plaintiff, who claimed it was his property. The levy was not void.

The verdict found "the ownership and right of possession" of fifteen cows, one bull, one boar, one sow, seventeen shoats, six horses and three colts were in defendant. The judgment was that the defendant "have and retain the property replevined" by virtue of the writ of replevin, and it is claimed the verdict and judgment are erroneous and require a reversal. The finding of the verdict that the ownership of the property described therein was in the defendant was wrong and should be treated as surplusage.

All defendant claimed was the right to the possession of the property by virtue of the levy of the execution upon it as the property of the judgment debtor. There is a stipulation between the parties in the record which from its language could only have been made after the verdict was returned. The stipulation recites the parties had agreed that the title to the property described in the replevin writ, except "that portion thereof which is included and recited in the verdict this day signed and returned by the jury in this suit," is in the plaintiff, and that no verdict of the jury or judgment of the court shall be necessary to vest title to such property in the plaintiff, and it was also agreed that there should be no action on the sheriff's bond on account of the title to said property being in the plaintiff, and it was further stipulated that the sole controversy was as to the right of possession of the live stock; that the right of possession of the other property taken in the replevin writ had been agreed to by the parties and was no longer involved in the controversy. In view of this agreement of the parties we cannot see how plaintiff can be prejudiced by the error in the verdict and judgment.

On the trial plaintiff testified as a witness in his own behalf. During his cross-examination the defendant was permitted by the court to make plaintiff his witness and examine him as such. This ruling of the court is complained of as reversible error. It was a matter resting in the sound discretion of the court. (*Wheeler & Wilson Manf. Co. v. Barrett*, 172 Ill. 610; *First Nat. Bank v. Lake Erie and Western Railroad Co.* 174 id. 36.) There was no abuse of discretion in the ruling of the court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12331.—Reversed and remanded.)

THE WISCONSIN STEEL COMPANY, Plaintiff in Error,
vs. THE INDUSTRIAL COMMISSION *et al.*—(JOSEPHINE
KARCZEWSKI, Admx., Defendant in Error.)

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. WORKMEN'S COMPENSATION—*inference that injury arose out of employment must be based on evidence—burden of proof.* The burden is on the applicant to prove that the accident arose out of the employment by direct and positive evidence or by evidence from which such inference can be fairly drawn without being based on mere conjecture or surmise.

2. SAME—*when there is no evidence that accident arose out of employment.* Where the body of an employee is found drowned near the place of his employment two days after his disappearance, and there is no proof, direct or circumstantial, to show why the employee went to the place where he was drowned or how he came to his death, the only conclusion that can be drawn is that the death was accidental, and there can be no inference that the accident arose out of the employment.

CARTER, J., dissenting.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

DAVID A. OREBAUGH, (EDGAR A. BANCROFT, of counsel,) for plaintiff in error.

T. A. SHEEHAN, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This was a proceeding before the Industrial Board by Josephine Karczewski, administratrix of the estate of her deceased husband, Felix Karczewski, to recover compensation under the Workmen's Compensation act on account of the drowning of her husband, who was in his lifetime an employee of the Wisconsin Steel Company, plaintiff in error. The Industrial Commission found in favor of the administratrix and entered a finding accordingly. The cause

was taken to the circuit court of Cook county by *certiorari* and the finding of the commission was affirmed. The trial judge certified that the case was one proper to be reviewed by this court, and the cause is here on writ of error.

Plaintiff in error owns and operates a large steel plant covering considerable ground in South Chicago, Illinois. Among its buildings are three cast-houses, in which are located furnaces known as Nos. 1, 2 and "A," and a storehouse in which the tools for making repairs are kept. The Calumet river runs in a northeasterly and southwesterly direction easterly of the cast-houses, and a slip has been made from the Calumet river south of the cast-houses, extending east and west about 1000 feet. Furnace "A" and its accompanying cast-house is situated nearest to and immediately north of the center of the slip. Furnaces Nos. 1 and 2 and their accompanying cast-houses are northeast of furnace "A," No. 1 lying east of No. 2, and the storehouse is located several hundred feet northeast of furnace No. 1, near the westerly bank of the Calumet river. The cast-house containing furnace "A" was about 75 or 100 feet north of the slip. The cast-house containing furnace No. 1 was some 400 feet north of said slip. Felix Karczewski (usually called Joe Pelka and who will be so called in this opinion) had been employed for several years by the plaintiff in error as a pipe-fitter. Each blast furnace consists of the furnace proper and the stove. There are two or more stoves for each furnace. The combustible gases from the top of the furnace are carried off through one of them and the flues of the stove thus heated to an intense heat. The gas is then turned into the other stove, and the blast is blown through the heated stove and enters the furnace at a very high temperature. Thus each stove is alternately being heated by combustible gases from the top of the furnace and being used to heat the air which is blown into the bottom of the furnace. When a blast is in progress the heat around the outside of the furnace, near its base, ranges

from 140° to 150° Fahrenheit. Besides the pipes or conduits through which the gas is carried from the furnace to the stoves and the blast carried from the stoves to the furnace, each furnace is also equipped with two water pipes about a foot in diameter running from the river to the furnace, which carry water to cool the base of the furnace. Pelka's work was to inspect the mechanical parts of the three furnaces and keep them, including the water pipes, in good repair, and occasionally he was called on to assist in repairing the gas pipes also, but he was especially charged with the care of the water pipes which cooled the furnaces. He went to work about five o'clock on the night of September 28, 1916, his duties requiring him to be present at the tapping of the three blast furnaces operated by the company, to repair leaks if any should occur in the water pipes, and to see that all mechanical parts of the furnaces were in repair. The casting of the furnaces consisted in taking the iron from them, which was done by tapping them,—taking out a clay plug at the bottom and running the molten iron into ladles. The record shows that on September 28 Pelka was present at four casts,—at 6:30, 7:30, 9:10 and 10 o'clock, respectively. He was not present at the cast which was made at 11:10 o'clock. One witness, however, testified that he saw him and talked with him about three minutes before 12 o'clock that night, and the wife of the keeper of a saloon outside the steel plant testified to seeing him at her husband's saloon at ten minutes after 10 o'clock that evening. The rule of the plaintiff in error was that no employee should leave the premises at this last named hour without permission of the foreman or his assistant, and none was given Pelka. It appears from the evidence that the only time an employee had a right, under the rule, to go outside of the plant without permission was during the lunch hour, from 12 o'clock midnight to 12:30 A. M., and then only if his card was punched by the timekeeper at the gate, and the record does not show that Pelka went

out through the gate at the midnight lunch hour. He did not appear at the casts that took place at 11:10 and 12:20 o'clock. There is no evidence that tends in any way to show why he was not present at the cast at 11:10 o'clock, for his fellow-employee, Gojyak, testified that he saw him and talked with him a few minutes before the midnight whistle blew, in the vicinity of furnace No. 2, and so far as the record shows he was never seen alive after that. The foreman testified that he missed him between 11 and 12 o'clock and made a search for him for some time thereafter but could find no trace of him. He was found drowned in the slip about 200 feet west of furnace "A" two days after he disappeared.

The only question presented is whether there is any proof to warrant the conclusion that the accident resulting in Pelka's death arose out of his employment. The evidence shows that when the furnaces were in operation they produced heat around the outside of the base varying from 140° to 150° Fahrenheit; that gases were liable to, and did, escape, which, when inhaled by the workmen, at times necessitated their going or being taken to the door or outside the building to get fresh air. One witness testified he had been taken to the river for air when gassed. Men accustomed to working around these furnaces could not readily detect the odor of the gas and were liable to be overcome or affected by it before they realized that gas was escaping. Pelka was last seen at about 12 o'clock midnight in the vicinity of furnace No. 2, and the witness who saw and talked with him did not testify that there was anything in his appearance or talk to indicate he was then affected by gas. The foreman of the plaintiff in error testified he was around the furnace that night thirteen hours and did not discover any gas. There was no proof that Pelka was affected by gas or heat the night of his disappearance. It is the theory of the defendant in error that Pelka was oppressed by heat or became faint and dizzy from gas, went

to the dock alongside the slip for fresh air, and fell and was drowned, or if he was in the vicinity of furnace "A" and desired to go to the storehouse, the best route would be along the slip to the river, then along the bank of the river northeast to the storehouse, or if he went on a tour of inspection of the water pipes, that would take him along the dock of the slip. It is said it will not be presumed that Pelka went to the slip or river for pleasure; that the reasonable inference is he went there in the performance of his duties, accidentally fell in and was drowned. There is nothing in the evidence to indicate that Pelka committed suicide or was murdered, but the conclusion is warranted that his death was accidental. Does the proof tend to show that it occurred while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental to it? The burden is on the applicant to prove that the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference can be fairly drawn and without being based on mere conjecture or surmise. (*International Harvester Co. v. Industrial Board*, 282 Ill. 489; *Savoy Hotel Co. v. Industrial Board*, 279 id. 329; *Central Garage v. Industrial Com.* 286 id. 291.) In *Peterson & Co. v. Industrial Board*, 281 Ill. 326, we said: "Liability cannot rest upon imagination, speculation or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them." The foreman testified there were no repairs made by Pelka the night of the accident; that Pelka had no duties that would take him to the slip, and that he (the foreman) gave him no orders that would require him to go there. Pelka was present when the cast was made at furnace No. 2 at 10 o'clock P. M. but was not present when any of the later casts were made. He was at the Tomecal saloon, outside the grounds of the plant, without permission, ten minutes after 10 o'clock, and was next seen at

or in the vicinity of furnace No. 2 three minutes before midnight but was not present when any other cast was made. There was no proof, direct or circumstantial, to show why he went to the river or slip, or whether he went there in fulfilling any duty of his employment or in doing anything incidental to his employment. The inference is as reasonable from the evidence that he went to the place of the accident as a voluntary act outside the duties of his employment, without the knowledge of his employer, and was drowned, as it is that he was acting in the line of the duties of his employment or engaged in something incidental to it. It can only be surmised or conjectured from the evidence how the accident happened and the reason Pelka came to the place where it occurred. Under all the authorities this is not sufficient upon which to predicate a liability.

The judgment is reversed and the cause remanded, with directions to the circuit court to set aside the award.

Reversed and remanded, with directions.

Mr. JUSTICE CARTER, dissenting:

I do not agree with the conclusion reached in the foregoing opinion. The principles involved in the opinion are so important and the facts so necessary to be understood that I am setting them out in this dissent at a little greater length and more in detail than set out in the opinion.

The evidence tends to show that there was more or less gas around the furnaces while a cast was being made. Workmen who are accustomed to working in the cast-houses become somewhat used to the gas,—acclimated as it were,—so that they cannot detect the odor of gas as readily as one who is only temporarily there, and that frequently the workmen, because they do not appreciate the danger, will thereby be overcome before they realize that gas is escaping. There is evidence tending to show, also, that the air in the cast-houses is worse when there is a good

breeze, and that on the night deceased disappeared there was a wind blowing from the cast-houses towards the slip with a velocity of from sixteen to twenty miles an hour. It appears that when the furnaces are in operation an intense heat around the outside of the base is produced. The evidence tends to show Pelka had theretofore complained of headaches and dizziness, caused by the gas fumes which he had inhaled about his work on the premises. There was evidence tending to show that there was a custom among employees, if they became overheated or gassed, to seek the fresh air outside the cast-houses, and that sometimes they were taken by their fellow-employees to the open places along the river or slip, and that there were no fences or barriers of any description to obstruct the passage of the workmen from the cast-houses to the slip. The evidence shows that after the accident and before the recovery of the body a large boat had been towed west into the slip, and that the body of the deceased was lying just underneath the front of this boat.

There was evidence offered that no gas was noticed in the furnace room by the employees on the night in question. There was also some evidence to the effect that it was not the custom of the employees, when overheated or affected by gas, to go to the river or slip for the purpose of getting fresh air. The foreman testified that the best place to recover from such an attack was in the door of the cast-house, as there was more air moving at that place. There is testimony also tending to show that it was not a hot night at the time of the accident and that deceased was wearing only overalls and jumper. There can be no question, however, from the record, that it is very hot when one is working about the furnaces.

It is conceded by both counsel that the only question at issue is whether the injury causing the death of the deceased took place in the course of and grew out of his employment. While the burden rests upon the applicant to

furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, such proof may be made by circumstantial as well as direct evidence. (*Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, and cases cited.) It is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it. Where there is ground for comparing and balancing probabilities at their respective values and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. (*Peoria Railway Terminal Co. v. Industrial Board*, 279 Ill. 352.) What is evidence of a fact and what is merely guessing at the fact can not be defined by any formula that one can invent. What is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. (*Owners of Ship Swansea Vale v. Rice*, 4 B. W. C. C. 298.) There can be no question that the death of Pelka was caused by his falling into the river or slip. There is no evidence in this record in any way tending to show that he was pushed in by some third party, and the presumption here must be against suicide on his part. The evidence shows that he had been in good health and there is an absolute absence of evidence showing suicide, therefore it must be presumed, under the authorities, that his death was accidental. (*Wilkinson v. Aetna Life Ins. Co.* 240 Ill. 205; *Devine v. National Safe Deposit Co.* 240 id. 369; *VonEtte v. Globe Newspaper Co.* (Mass.) L. R. A. 1916D, 641.) It has been held that an employee is engaged in the course of his employment when an injury occurs within the period of his employment, at a place where he may reasonably be and while he is reasonably fulfilling the duties of his em-

ployment or is engaged in doing something incidental to it. (*Dietzen Co. v. Industrial Board*, 279 Ill. 11.) The deceased was seen alive and well just before midnight, was not present at the casting of the furnace at 12:20 o'clock and immediately thereafter search was made for him, so it is a fair inference that he was drowned some time between 12 o'clock midnight and 12:30 thereafter, and that the accident occurred during the regular hours of employment, on the premises of plaintiff in error. If there is any evidence fairly tending to show that the duties of deceased, or anything which may be held to be fairly incidental thereto, took him along the slip at the time he fell in, then there can be no question, under the authorities, that the accident arose out of and in the course of his employment. The burden is on the applicant to prove his case. This does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the deceased fell into the water and was drowned while performing duties in the course of his employment or duties incidental to that employment, then the case is proved. *Marshall v. Owners of Ship Wild Rose*, 3 B. W. C. C. 514.

Many cases somewhat similar as to the facts have been decided in various jurisdictions under statutes worded similarly to our own. It has been stated that cases are valuable in so far as they contain principles of law and also to show the way in which the judges regard facts. (*Peoria Railway Terminal Co. v. Industrial Board*, *supra*.) In *Mackinnon v. Miller*, 2 B. W. C. C. 64, an engineer on board a small tug, when last seen, was asleep in his bunk at five o'clock A. M. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to move at seven o'clock A. M., and steam had been ordered gotten up for that hour. The deck was a place where between five and seven o'clock A. M.

the deceased was entitled to be. The bulwark was twenty inches in height. Two days afterwards his body, clothed in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question but there was no direct evidence as to how he met his death. It was held that the arbitrator was entitled to draw, as he had drawn, the inference of fact that the deceased had accidentally fallen overboard and was drowned and that the accident arose "out of and in the course of" his employment, and it was therefore not for the court to interfere.

In *Owners of Ship Swansea Vale v. Rice, supra*, the deceased was chief officer of the ship, whose duty it was to be employed on the deck. He disappeared in broad daylight, no one having seen him fall overboard, but there was evidence that not long before he complained of a headache and giddiness. It was held by a divided court that there was evidence under which the court might infer that he fell overboard from an accident arising out of and in the course of his employment. In deciding the case in the House of Lords, one of the judges writing the opinion, after discussing various things which might have happened, said (p. 301): "The only other alternative is suicide or murder, and if you weigh the probabilities one way or the other, the probabilities are distinctly greater in favor of the view that this man perished from accident arising out of his employment."

In *Kerr v. Ayr Steam Shipping Co.* (1915) App. Cas. 217, a steward of a ship in harbor was lying in his bunk when he was told by the captain to prepare some tea for the crew. Shortly afterwards he was missing. The next day his dead body, dressed only in his underclothes, was found in the sea near the ship. The bulwarks were three feet five inches above the deck. He was a sober man but was subject to nausea. Murder and suicide were negatived by the arbitrator, who drew the inference that the

deceased went on deck and accidentally fell overboard and was drowned, and held that the accident arose out of and in the course of his employment as steward. The court of session (Lord Guthrie dissenting) reversed the decision on the ground that there was no evidence to support it. The House of Lords by a divided court upheld the finding of the arbitrator, and stated that although upon the evidence it was open to the arbitrator to take a different view, his conclusion was one that a reasonable man could reach, and therefore, even though the court might take a different view if the judges themselves were deciding the question as to the facts, the only duty of the court was to decide whether the conclusion was one that could have been reached from the evidence by a reasonable man.

In *Marshall v. Owners of Ship Wild Rose*, *supra*, an engineer came on board a vessel, which was lying in a harbor basin, shortly after 10 o'clock P. M. Steam had to be gotten up by midnight. He went below and took off his clothes, except trousers, shirt and socks. It was a very hot night. He subsequently got out of his berth, saying he was going on deck for a breath of fresh air. Next morning his dead body was found at the side of the vessel, just under the place where the men usually sat when they went on deck to get fresh air. The county judge found that he came to his death by an accident arising out of and in the course of his employment, and by a divided court his decision was reversed, the court holding that there was no legitimate ground for drawing the inference that he died from an accident arising out of his employment.

In *VonEtte v. Globe Newspaper Co.* *supra*, VonEtte was employed by the newspaper company as a compositor. He went to work on the evening of June 21, 1914, and his employment would have been finished at a quarter before two o'clock the next morning. He was last seen alive about eleven o'clock that evening. His dead body was found the next morning at a quarter before four o'clock upon the

ground, six stories below the floor where he worked. The injuries which caused his death resulted from falling from the roof of the building adjoining the room in which he worked. He was apparently in good health, cheerful in disposition, and there was no evidence tending to show that he had any trouble of any kind. The evidence tended to show that there was an established custom among the employees, known to the employer, to go out upon that roof to obtain fresh air. The Industrial Board found that the accident arose out of and in the course of the employment, there being no evidence that indicated any other cause of death, and the court affirmed the finding.

A reading of the opinions in the cases just cited, a number of them being decided by divided courts, will show how close were some of the questions involved and how difficult it is for all men to agree whether an accident somewhat similar to the one here under consideration arose out of and in the course of the employment. The deceased was the only pipe-fitter working on the night in question. He was required to look after and inspect and keep in good repair all the mechanical parts of the three furnaces and the six water pipes carrying the water from the river to the furnaces. In the performance of these duties, as I understand the record, he necessarily had to travel to and from the three cast-houses, the boiler house, and the storehouse northeast of the cast-houses, and might be required to go to a small storehouse just south of the cast-house in which was located furnace "A" and 70 or 80 feet north of the slip where his dead body was found. There were no regular roads or passageways on these premises. Buildings, railroad tracks, tanks, sheds and structures of all kinds were located wherever convenience demanded. It might be impossible to take a direct course in going from one place to another. It was, however, possible to walk from the western extremity to the eastern extremity of the plant, and it would appear reasonable from the evidence in the

record that in going from one extremity of the plant to the other a workman might think it more convenient to go to the Calumet river and walk on the dock or cement walk alongside the river and the slip. In going from the large storehouse it would not require much of a detour to take the route along the river and slip to furnace "A." The evidence tends strongly to show that there was always liable to be gas in and about the furnaces, and that deceased had complained theretofore to his family about headaches and dizziness caused by inhaling these gas fumes. In addition to the impurity of the air, the heat around the base of the furnaces must necessarily at all times have been somewhat oppressive, ranging from 140° to 150° Fahrenheit, the heat within the furnaces being from 500° to 1500° Fahrenheit. The evidence tends to show that it was a custom, known to the foreman of plaintiff in error, for the men, when oppressed by the heat or troubled by the gas, to go outside the buildings to cool off or get fresh air to counteract the effect of the fumes; that generally the men so overheated or troubled by gas would satisfy themselves by simply stepping outside the cast-house, but that sometimes they would go even to the boundaries of the river or the slip, and that once outside the cast-house there were no fences or boundaries between them and the dock or cement walk alongside the river and slip.

The suggestion offered by plaintiff in error as to how the deceased came to his death is that he fell into the slip while returning from a secret visit to the saloon and while he was intoxicated. This question cannot be raised here, as it was specifically stated on the trial before the Industrial Board that plaintiff in error made no question as to deceased being intoxicated, therefore counsel acting for plaintiff in error cannot for the first time raise that question here. (*American Milling Co. v. Industrial Board*, 279 Ill. 560, and cases cited.) Moreover, the direct evidence shows that the deceased was not under the influence of liquor

when he visited Tomecal's saloon a little after 10 o'clock, and his fellow-employee, Gojyak, stated that when he was last seen alive, just before midnight, he was not intoxicated. The suggestion also seems to be made that deceased may have gone down to the river or the slip to look at the stars or for some other reason not connected with his employment. There is no evidence tending to support in any way this theory. If, however, he was oppressed by heat or felt faint or dizzy from gas the dock along the river or slip would be one of the most probable places where he would go for fresh air, or if he were in the vicinity of certain cast-houses and wanted to go to a certain storehouse, one of the easiest and most reasonable routes for him to take would be to proceed along the slip and river.

The authorities all agree that the arbitrator must not surmise, conjecture or guess in reaching his conclusion; that he must infer from the facts actually proven, and that while it is impossible to lay down any rule as to the degree of proof sufficient to justify an inference being drawn, it must be such that the evidence would induce a reasonable man to draw it; that if the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then the applicant fails to prove his case; but where there is ground for comparing and balancing probabilities at their respective values, when the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in his favor. (*Peoria Railway Terminal Co. v. Industrial Board, supra.*) The only question before the court is whether the arbitrator was justified, on the facts proved, in drawing the conclusion that he has drawn. As was stated in one of the opinions in *Owners of Ship Swansea Vale v. Rice, supra*, in weighing the probabilities in this case the probabilities are distinctly greater that this man perished through an accident arising out of and in the course of his employment than any of the alter-

natives suggested. Furthermore, as was said by the court in *VonEtte v. Globe Newspaper Co. supra*, on page 643: "A finding by the Industrial Board is not to be set aside if warranted by the evidence although we might feel that a different conclusion would have been reached by us if we had been called upon to decide the question in the first instance. If this claimant were required to prove all the facts and circumstances attending her husband's death by direct evidence it is plain that her claim would fail. But she is not limited to such proof. She may show the existence of such facts as would warrant the inference that her husband did not commit suicide and did not meet with his death as the result of intoxication. * * * We can not say that the finding of the board that his death was accidental was not warranted." The reasoning in the foregoing quotation applies here, and I think that a similar conclusion should be reached.

(No. 11208.—Rule discharged.)

THE PEOPLE *ex rel.* The Chicago Bar Association, Relator,
vs. JOHN S. CHARONE, Respondent.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. DISBARMENT—*when failure to exercise good judgment will not disbar.* Mere failure of an attorney to exercise good judgment in his transactions with his clients, due to his inexperience rather than an intent to act dishonorably or unprofessionally, is not ground for disbarment.

2. SAME—*attorney should exercise diligence in discharge of his duties.* The relation of attorney and client is a fiduciary relation, and an attorney owes it to himself and to his profession to exercise diligence in the discharge of his duties.

INFORMATION to disbar.

ARTHUR DYRENFORTH, and JOHN L. FOGLE, (LLOYD M. BROWN, of counsel,) for relator.

JOHN S. CHARONE, *pro se*, (BENJAMIN P. ACKERMAN, of counsel,) for respondent.

MR. JUSTICE STONE delivered the opinion of the court:

An information in the name of the People, on the relation of the Chicago Bar Association, praying that the name of the respondent, John S. Charone, be stricken from the roll of the attorneys of this court was filed and he was ruled to answer. Respondent was admitted to the bar by this court in December, 1913, since which time he has been practicing in the city of Chicago.

The original information contained three counts. An additional count was filed with the commissioner and notice given that on the submission of the cause as set out in the three original counts to the Supreme Court the relator would ask to amend the original information by adding thereto the additional count so filed, and that relator would file said amendment to the information before the commissioner and submit evidence in support of said additional count during the time limited by the court in which to take evidence, and that relator would rely on said amended count and the evidence taken thereunder in support of the prayer in the original information. The commissioner heard the evidence and has filed his report of findings and conclusions thereon, which evidence, findings of fact and conclusions are in substance as follows:

First count: That in 1915 respondent was retained by Julius Gaters in the matter of his divorce suit and was paid the sum of \$37. Gaters testifies that respondent repeatedly told him that the divorce suit had been filed and was liable to be up most any time. Respondent testifies that he was to receive \$50 in full for his services before any bill was filed, and denies that he told Gaters at any time that suit had been instituted. The respondent further testifies that he drew two bills for Gaters charging desertion on the part of the wife of Gaters; that respondent was unable to as-

certain from Gaters the date of the wife's desertion; that respondent informed Gaters that he would have to bring in two credible witnesses to substantiate the charges in the bill; that on investigation respondent was in possession of some evidence to the effect that Gaters, and not his wife, deserted; that respondent was at all times ready, willing and able to file said suit but was prevented from so doing by the failure of Gaters to pay him the full amount of \$50, of which \$13 is still due, and by his failure to furnish the necessary evidence to support said bill. The commissioner has found the facts and circumstances surrounding the bringing of the divorce suit as testified to by the respondent. Gaters produced in evidence two receipts: one for \$37 for services in securing a divorce, showing a balance of \$13, signed by the respondent; the second, on the letter-head of the respondent, on the same day, promising to file a bill for divorce on Monday, July 10, 1916, and get a decree not later than six weeks thereafter, signed by the respondent. The respondent testified, and is corroborated by Irene Shedden, to the effect that these receipts were made and delivered under duress; that Gaters came into his office, threatened respondent and compelled him to put those statements in writing, and while so writing Gaters had a razor in his hand, waving it in a threatening manner; that Gaters threatened to cut him with the razor. It is admitted by the respondent that he received \$37 and that no suit for divorce has been filed. The commissioner finds that the two receipts in question were given to Gaters because of his threats to inflict bodily injury upon the respondent; that the respondent is ready and willing to file the bill and prosecute the suit for Gaters upon the receipt of the \$13 due him and the production of the necessary witnesses to support the bill. The commissioner suggests to this court that the conduct of Gaters in this matter should not receive direct or indirect commendation by finding adversely to the respondent.

Second count: That in May, 1915, through the recommendation of Gaters, Mrs. Elsie Spriggs employed respondent to secure a divorce for her and paid the respondent \$25, for which he gave his receipt. In June, 1915, she paid him \$15, for which he gave a receipt, and \$10 more was to be paid when the decree was entered. The respondent prepared the bill for divorce and the same was docketed in the circuit court as No. B18,685. A summons issued on the bill and was delivered to the sheriff and by him returned "Not found." The respondent and Mrs. Spriggs had several conversations in his office and over the telephone relating to the whereabouts of the defendant, Spriggs. The respondent testifies in detail relative to calls made by him at various addresses given him by Mrs. Spriggs in order to locate the defendant, which testimony is undisputed. In 1916 Mrs. Spriggs accused the respondent of failing to file any bill for her, in response to which he gave her the receipts from the clerk and sheriff showing that the bill had been filed and summons issued. The commissioner finds that Mrs. Spriggs gave no information to respondent as to the whereabouts of Spriggs other than the addresses mentioned by the respondent, who was unable to locate Spriggs, and that service could not be had by publication for the reason that Mrs. Spriggs insisted that her husband was in the city of Chicago; that respondent is ready and willing to proceed with the Spriggs case upon information to secure service on the defendant and upon the production of the required evidence to substantiate the charges in the bill; that respondent has done all that he could do in the matter with the information at hand and is not guilty of negligence or bad faith toward Mrs. Spriggs.

Third count: That in November, 1915, Fred C. Schulz, agent of Sherman P. Stultz, employed respondent to prosecute a suit against Mrs. Anna Kemisch, a tenant, for money due; that respondent was paid \$10 to pay costs and apply on fees and was to receive \$5 extra out of money collected.

The respondent brought suit, upon which judgment was entered by default November 18, 1915, for \$25, and \$3 costs were taxed. Execution was issued on this judgment but was not delivered to the bailiff, due to the fact that the same became mislaid in moving the office effects of the respondent. In April, 1916, Schulz demanded the execution of the respondent and refused the respondent's request to continue the matter, whereupon the following day respondent sent the execution to Schulz. An alias execution was issued and delivered to the bailiff, who made demand upon Mrs. Kemisch and a levy. Some time after April 28, 1916, Mrs. Kemisch went to the respondent's office and paid \$30 to the stenographer in charge, who delivered it to respondent, at which time Mrs. Kemisch left the copy of the execution served on her April 28, 1916. Respondent testified that upon receipt of the money he called up Schulz's office; that Schulz was not in nor did he call back; that he repeated his call, which was never answered. The respondent claimed \$5 for his services and offered to return the \$25 in full if the same would be accepted in full payment, which was accepted by one Richards, acting for Schulz, whereupon the respondent promised to pay the money at noon on Saturday. Schulz called the respondent's office at 11:30 on the same day and stated that nothing less than \$30 would be accepted, and respondent retained the money pending a receipt from Schulz as requested. The commissioner further reported that while the preliminary proceedings against the respondent were pending before the bar association, on October 19, 1916, Schulz wrote a letter to the respondent, stating, in substance, that a replication to respondent's answer would be filed and the charges in the original complaint pressed unless the amount of \$25 was paid by the respondent by Tuesday, October, 24, 1916, and that if the amount was paid the complaints and charges filed with the grievance committee of the Chicago Bar Association would be dropped. This letter was written without the knowledge

or consent of the said commissioner, the said Chicago Bar Association or any of its officers. The respondent refused to pay the money at the time designated, on the ground that he believed that such action on his part might be construed as an admission of the charges preferred against him. At the first hearing of this cause respondent tendered the \$25 which he admitted was due Schulz for Stultz, with \$1.50 interest, which was accepted without condition of any kind as to the issues herein involved. The commissioner finds that the attempt of Schulz to use the Chicago Bar Association as a collection agency is improper; that respondent was negligent in handling the collection of said judgment; that he should have remitted the \$25 and retained the \$5 pending the settlement of the controversy; that if Schulz had not changed his mind several times and had manifested some business courtesy toward the respondent the payment of the money would probably have been made without delay.

Additional count: That the substance of the evidence on the additional count tends to show that in October, 1916, S. Steinman employed one Bernstein, an expressman, to haul some household goods; that Steinman paid Bernstein by check for his services, and afterwards, because of certain differences, stopped payment on the check; that Bernstein thereupon went to the office of Steinman and in his absence seized and carried away a sewing machine belonging to Steinman, valued at \$25; that Steinman employed the respondent as an attorney in his behalf; that respondent, upon the advice and consent of Steinman, procured a warrant for the arrest of the Bernstein brothers on the ground of disorderly conduct; that the arrest was made and it does not appear what disposition was made of the case, except that on suggestion of the assistant State's attorney the respondent was to either go to the State's attorney's office or bring a replevin suit; that respondent and Steinman agreed to a fee of \$10 for respondent's services

in this matter, for which a receipt was given by respondent; that it appears that on December 1, 1916, Steinman paid respondent \$15, and received a receipt for the same, on account of costs, and that upon payment of \$9 more there were to be no more costs in the matter, and if it really became necessary to incur further costs respondent would refund the excess, and in the event of recovery respondent was to receive one-third of the amount realized. The testimony is very conflicting as to what transpired after December 1, 1916. Steinman testified that respondent was to return the money or get the machine and that respondent delayed the matter from time to time, repeatedly promising to prosecute the suit but which he did not do. It further appears that on January 19, 1917, respondent wrote a letter to Steinman, in which he stated that he had called the office of the clerk of the court and received the report that the case in controversy would definitely come up February 4, 1917; that respondent had had trouble, in that his father had been taken to the hospital and died on the morning in question; that on February 4 the matter in question would be disposed of finally. The testimony of the respondent is to the effect that when he wrote this letter he contemplated that he had ample time to file the necessary papers, secure security and have bond approved and get service in time to have the case called on the day mentioned; that respondent conferred with Steinman regarding the surety on the replevin bond; that Steinman said he did not care to ask his relatives to sign such a bond and requested the respondent to get someone to act as surety. Steinman says respondent volunteered, in the first instance, to get the surety. Respondent testifies that at his request his mother signed a blank replevin bond and schedule and the clerk O. K.'d her signature; that he tried to get Steinman down to sign the bond but could not do so. The testimony is conflicting as to whether it occurred on the 15th

or 19th of January. Some time after February 4, 1917, Steinman engaged attorney Barnett to represent him. The testimony tends to show that Steinman and Barnett, at the office of the respondent, demanded the full amount of \$34 heretofore paid to the respondent; that respondent offered to return \$24 to Steinman, who was advised by his attorney, Barnett, to accept it, but Steinman refused to compromise on any amount less than \$34; that respondent agreed to proceed in the replevin suit if Steinman would sign the bond or he would advance the costs to Barnett, attorney for Steinman, and turn over the balance; that on the day before the first hearing in this case the respondent offered to permit Steinman to use the bond in question in the prosecution of the replevin suit under the direction of his attorney, Barnett, which was refused; that respondent made no legal tender of the money to Steinman. The commissioner finds that the \$10 first paid by Steinman was for legal services rendered in the criminal court and that Steinman is not entitled to be re-paid that sum on any theory; that the \$24 aforesaid was to cover court costs in a replevin suit to recover the sewing machine in question and a damage suit against the Bernsteins; that the damage suit was not to be started until after the trial of the replevin suit; that the replevin suit was never started; that the respondent was negligent in the latter matter, but to some extent this was due to lack of experience and judgment in dealing with clients and to some extent due to the unreasonableness of Steinman; that respondent should not have written the letter of January 19 unless the suit had actually been brought or respondent knew positively when he wrote the letter, because he might have anticipated the difficulty that would arise in having the bond executed by Steinman. The commissioner concludes that the respondent was unfortunate in having Steinman for a client; that respondent should have insisted upon Steinman executing the bond in question, and

upon his refusal to do so he should have promptly returned the \$24 and notified Steinman that he would no longer act as his attorney.

The commissioner concludes that the evidence submitted to him on the whole record is not sufficient to show that the respondent has been dishonorable or criminal in his conduct or that he lacks good moral character, as charged in the information. The commissioner suggests to this court that respondent is a young lawyer of limited experience and of small means, forced by his circumstances to accept cases and clients of the kind mentioned in these proceedings; that although respondent failed to exercise good judgment in his transactions with Schulz and Steinman, yet such failure, in the mind of the commissioner, was due to his lack of judgment under the circumstances rather than an intent to act dishonorably or unprofessionally, or in any manner calculated to bring the courts of justice into disrepute and contempt and to tarnish the good name of the legal profession.

We have examined the evidence in this case carefully, and are of the opinion that while it does not disclose unprofessional or dishonorable conduct on the part of the respondent it does disclose that either through lack of judgment or diligence, or both, respondent has not, in at least part of the cases referred to in the information, given to the business of his client the earnest attention which his duty as an attorney at law demands. An attorney at law cannot be too careful to avoid that which would tend to destroy the confidence of his client in his diligence. The relation of attorney and client is a fiduciary relation, and every attorney at law owes it to himself and to his profession to exercise diligence in the discharge of his duties.

The commissioner has found that the evidence does not show dishonorable or unprofessional conduct, and we are of the opinion that the report of the commissioner should be affirmed and that the rule should be discharged.

Rule discharged.

(No. 12599.—Decree affirmed.)

JANE BARNARD SKINNER, Appellant, *vs.* THE NORTHERN TRUST COMPANY *et al.* Appellees.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. CHARITIES—*charitable uses are not within rule against perpetuities.* The statute of charitable uses is a part of the common law of Illinois, and conveyances or devises to charitable uses are not within the rule against perpetuities.

2. SAME—*gifts to charity are favored by the courts.* Gifts to charity are looked upon with favor by the courts and every presumption consistent with the language used will be indulged in to sustain them.

3. SAME—*when devise is to charitable uses.* Where property is devised in trust for the benefit of corporations that have no capital stock and can declare no dividends, and all of whose property or funds must be used for the carrying on of charitable purposes as set out in their charters, the devise is one to charitable uses.

APPEAL from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding.

HELMER, MOULTON, WHITMAN & WHITMAN, (JOHN B. SKINNER, of counsel,) for appellant.

BAYLEY & WEBSTER, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from the decree of the circuit court of Cook county dismissing for want of equity a bill filed by appellant praying that clause 13 of the last will and testament of Louise May Whitehouse be set aside and the trust therein created be held void and inoperative for the reason that said clause is in violation of the established rule against perpetuities.

The contested clause of the will, after devising all of the testatrix's property to the Northern Trust Company as trustee, with full power to manage, lease, invest, sell and convey, and with directions to sell all non-income property,

with authority to employ agents, attorneys, etc., reads as follows: "Said trustee shall collect the income of said trust estate and shall pay from the net income derived therefrom, to my sister, Jane Barnard Skinner, the sum of two thousand (\$2000) dollars per year, to be paid semi-annually so long as she shall survive me; and shall also pay from such net income to my dear friend Edna Murphy Trego the sum of five hundred (\$500) dollars per year, to be paid semi-annually so long as the said Edna Murphy Trego shall survive me; and shall also pay to Martha Clarke Howland, of Union Springs, New York, the sum of three hundred (\$300) dollars per year so long as said Martha Clarke Howland shall survive me; and shall pay the balance of the net income of said trust estate, semi-annually, to the five (5) charitable corporations hereinafter named, in equal shares. From and after the death of the last survivor of them, the said Jane Barnard Skinner, Edna Murphy Trego and Martha Clarke Howland, said trustee shall pay the net income of said trust estate, semi-annually, as follows: One-fifth thereof to the Visiting Nurse Association of Chicago, to be used by said association in carrying out its charitable purposes; another fifth thereof to the Home for Destitute Crippled Children of the city of Chicago, to use in carrying out its charitable purposes; another fifth thereof to the Glenwood Manual Training School, located at Glenwood, Cook county, Illinois, to be used in carrying out its charitable purposes; another fifth thereof to the Alexian Brothers' Hospital in the city of Chicago, to be used in carrying out the purposes of said hospital, in recognition of its kindly services to my father; and the other fifth thereof to the Illinois Humane Society of the city of Chicago, to be used, in its discretion, in the erection of street fountains in the city of Chicago, and if not used for such street fountains, then to be used in carrying out the charitable purposes of said society. Said trust established by this clause 13 of my will shall continue perpetually for the ben-

efit of the said five charitable organizations hereinbefore named, and in case either of said charitable organizations shall cease to exist, then its successor, if any, in the same charitable work theretofore carried on by it, shall succeed to the benefits hereunder and be entitled thereto in place of such organization ceasing to exist; and in case either of said five charitable organizations in this clause mentioned shall cease to exist and shall leave no successor to carry on the work theretofore carried on by such organization, then the share of such net income hereby given to such organization so ceasing to exist shall thereafter be added, semi-annually and equally, to the shares of the other charitable organizations hereinbefore mentioned then existing."

It is contended by the appellant that the bequests in clause 13 come within the rule against the creation of perpetuities; that the corporations designated in said clause as charitable corporations are not such in fact; that they have no charitable purposes for the carrying out of which the income from the trust estate is given; that the doctrine of reverter to the original owner or his heirs in case of corporate dissolution is applicable to public and eleemosynary corporations; that the nature of the corporation as well as its purposes or objects must be determined from its charter or articles of association and cannot be shown by extrinsic evidence.

It is conceded by the parties to this suit that clause 13 creates a perpetuity. The appellees, however, contend that they are not within the operation of the rule, on the ground that the character and purpose of the beneficiaries named in said will and of the bequests bring them within the exception in favor of trusts for charitable uses.

The only evidence submitted to support the contention of the appellant in the circuit court was the certified copy of the charter of each of said five corporations.

It is well settled in this State that conveyances and devises to charitable uses are not within the rule against per-

petuities. The statute of charitable uses (43 Eliz. chap. 4,) is a part of the common law of this State. (*Heuser v. Harris*, 42 Ill. 425; *Crerar v. Williams*, 145 id. 625; *Franklin v. Hastings*, 253 id. 46; *Andrews v. Andrews*, 110 id. 223; *Welch v. Caldwell*, 226 id. 488; *French v. Calkins*, 252 id. 243.) Gifts to charity are looked upon with favor by the courts. Every presumption consistent with the language used will be indulged in to sustain them. (*Franklin v. Hastings*, *supra*.) A charity, as defined by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen, 556, and approved by this court, is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Crerar v. Williams*, *supra*.

In *Grand Lodge v. Board of Review*, 281 Ill. 480, this court said: "It is the duty of the public to care for the indigent and the poor who are sick and afflicted, and while the public burden is not for the relief of aged and indigent Masons, as such, the public is not relieved from the burden because they are Masons, and any institution which serves no selfish interest, but discharges, in whole or in part, any such duty, is a public charity. To constitute a public charity the benefit must not be conferred upon certain and defined individuals but must be conferred on indefinite persons composing the public or some part of the public, but the indefinite class may be of one sex, or the inhabitants of a particular city, town or county, or members of a particular religious or secular organization. * * * A home

for working girls provided at moderate cost, with officers serving without compensation, with free attendance of physicians on the hospital staff and a library and weekly entertainments, was held to be a public charity in *Franklin Square House v. Boston*, 188 Mass. 409, and we see no apparent reason for saying that a classification must be based on something which involuntarily affects the public at large. A public charity cannot be limited to defined individuals, but if it operates upon indefinite persons whose care and support rest upon the public, the effect is to afford relief from the public burden and the charity is public in its nature."

With these definitions in mind we view the testimony offered by appellant under the contention that four of the five corporations named in the will of the testatrix are not charitable bodies. It is contended that the question whether or not said corporations are charitable corporations must be determined, alone, from the powers given by their charters, and pursuant to that contention appellant offered certified copies of said charters in evidence. As it is admitted by the appellant that one of said corporations, the Alexian Brothers' Hospital, is a charitable body, we will pass to an examination of the charters of the remaining four.

In the charter of the Illinois Humane Society its objects are stated to be: "The prevention of cruelty to children, the enforcement of laws concerning cruelty to children, and the procuring or enactment of laws prohibiting cruelty to children and declaring the punishment therefor." The objects of the Glenwood Manual Training School are shown by its charter to be "to provide a home and proper training school for destitute and dependent boys who may be committed to their charge, and is not for pecuniary profit." The object of the Home for Destitute and Crippled Children, as shown by its charter, is as follows: "The object for which it is formed is to build and conduct a home and provide for destitute crippled children." The Visiting

Nurse Association is chartered under the following provision: "The object for which it is formed is for the benefit and assistance of those otherwise unable to secure skilled attendance in time of illness, to promote cleanliness and to teach proper care of the sick, and to establish or maintain one or more hospitals for the sick or a house or houses for the accommodation or training of nurses."

It is clear from reading the charters of these corporations that their purposes are charitable purposes. Their entire funds must be devoted to the objects named. Those objects, in each case, are to help those who cannot help themselves, thereby lessening the burdens of government. They have no capital stock and can declare no dividends. All property or funds received by them must be used for the carrying on of their purposes as set out in their charters.

It is urged that the devises are void for the reason that although said corporations are held to be charitable corporations yet they and their successors may cease to exist, in which event the residuary estate would vest in the heirs of the testatrix, and that a devise to such remote heirs cannot come under the head of a devise for charitable uses. If this were the law there could be no such thing as a charitable use not affected by the rule against perpetuities, as such a possibility of reverter always exists in law in such a devise.

We are of the opinion that the corporations are charitable corporations and the devises to them were for charitable purposes and therefore are without the rule against perpetuities.

The circuit court did not err in dismissing appellant's bill, and the decree of that court will be affirmed.

Decree affirmed.

(No. 12648.—Reversed and remanded.)

THE PEOPLE, for use, etc., Appellee, vs. JAMES E. KANE,
Appellant.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. PRACTICE—*judgment will not be reversed for matter of form.* Section 77 of the Practice act provides that no verdict or judgment shall be set aside for irregularity, only, unless cause be shown for the same during the term such judgment or verdict shall be given, and where an action is in debt and the verdict and judgment are for damages, and no objection is made to either on account of form, the judgment will not for that reason be reversed.

2. MEDICINE AND SURGERY—*under act of 1885, authorizing fine for practicing without license, the first offense means the first conviction.* Under the act of 1885, authorizing a recovery of \$100 for the first offense and \$200 for each subsequent offense of practicing medicine without a license, the offense does not consist of treating some individual but of practicing generally, so that a first offense means a first conviction, and there cannot be a conviction for more than one first offense, regardless of the number of individuals the defendant is shown to have treated.

3. SAME—*the legislature may define "practicing medicine" so as to include chiropractice.* Although the chiropractor's method of treating physical ailments, injuries or deformities is not within the common meaning of the term "practicing medicine," the General Assembly, in an act authorizing a fine for practicing medicine without a license, may define the practice of medicine so as to include chiropractice.

4. SAME—*act of 1885, providing for examination for licenses to practice medicine, is not invalid.* The act of 1885, as amended, providing for examination of applicants for licenses to practice medicine, is not invalid as giving arbitrary power to the State Board of Health to grant or refuse licenses, in its own discretion, to persons employing methods of treating human ailments without the use of medicine, as such act, while it does not prescribe the qualifications of such persons, does provide that all examinations shall be conducted under rules and regulations prescribed by the board, and such rules are subject to review by the courts to determine their reasonableness.

5. POLICE POWER—*the legislature is sole judge of what laws are necessary for protection of public health.* The State has a right to regulate any and all kinds of occupations for the purpose of

protecting the lives and health of the people, and within constitutional limits the legislature is the sole judge of what laws shall be enacted for such purpose, as all such measures and regulations are within the scope of the police power.

6. SAME—*exercise of police power must be reasonably necessary to accomplish legitimate object.* The exercise of the police power is subject to constitutional limitations, and the power extends only to such measures as are reasonably necessary and appropriate for the accomplishment of a legitimate object within the domain of the police power.

7. SAME—*legislature cannot invest administrative board with arbitrary power over rights of citizens.* Every citizen has a right to be governed by fixed rules and cannot be subjected to the will or caprice of an administrative board, and the legislature cannot invest any board or commission with arbitrary discretion, which may be exercised in the interest of a favored few or which affords opportunity for unjust discrimination.

APPEAL from the County Court of Macon county; the Hon. JOHN H. MCCOY, Judge, presiding.

WHITLEY & FITZGERALD, and JOHN A. WALGREN, for appellant.

EDWARD J. BRUNDAGE, Attorney General, JESSE L. DECK, State's Attorney, ALBERT D. RODENBERG, CHARLES F. EVANS, and A. R. IVENS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The People of the State of Illinois, for the use of the State Board of Health, appellee, commenced this action in debt in the county court of Macon county against James E. Kane, appellant, and filed a declaration containing ten counts, charging him with practicing medicine without a license from the State Board of Health. The plea was the general issue, and upon a trial there was a verdict for the defendant. The court granted a new trial, and on the second trial there was again a verdict for the defendant and judgment accordingly. The plaintiff appealed to the Ap-

pellate Court, which reversed the judgment and remanded the cause. On the third trial there was a verdict for the plaintiff and assessing damages at \$500. The court rendered judgment on the verdict and ordered that the defendant be committed to the common jail of Macon county until the fine and costs were paid. This appeal was prosecuted from that judgment.

The action was debt and the verdict and judgment were for damages, but no objection was made to either on account of form, and the judgment will not be reversed for formal matters of that kind. (*Bowden v. Bowden*, 75 Ill. 111.) Section 77 of the Practice act provides that no verdict or judgment shall be set aside for irregularity, only, unless cause be shown for the same during the sitting of court at the term such judgment or verdict shall be given.

The suit was brought under the act of 1885 as afterward amended, which authorized a recovery of \$100 for the first offense and \$200 for each subsequent offense. The offense defined by the act consisted in practicing medicine or surgery or treating human ailments without a certificate issued by the State Board of Health. The offense did not consist of treating some individual but for practicing medicine generally by treating the public, so that a first offense meant a first conviction. There could not be a judgment for five first offenses, and the judgment must be reversed for that reason.

The appeal was taken to this court on the ground that the act was in conflict with the constitution and therefore void. It was enacted in the exercise of police power for the protection of the lives and health of the people. The State has a right to regulate any and all kinds of occupations for that purpose, and all measures and regulations for the protection of the public health, not infringing upon constitutional rights, are within the scope of the police power. The right of a citizen to follow any legitimate occupation is subject to the paramount power of the State

to impose such regulations as may be required to secure the people against ignorance, incapacity, deception or fraud in the practice of medicine, subject only to such restraints as are imposed by the constitution. Section 7 of the act provided that any person should be regarded as practicing medicine within the meaning of the act who should treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another. The defendant was a chiropractor, and his practice consisted of adjusting the vertebræ of the spinal column. That method of treating physical ailments, injuries or deformities is not within the common meaning of the term "practicing medicine," but the General Assembly had a right to define the practice of medicine for the purposes of the act so as to include that method. *People v. Gordon*, 194 Ill. 560.

Within constitutional limits the General Assembly is the sole judge of what laws shall be enacted for the protection of the public health, and so long as it does not infringe upon inherent or constitutional rights its determination of what measures and regulations shall be adopted is conclusive. The exercise of the police power, however, is subject to constitutional limitations, and the power extends only to such measures as are reasonably necessary and appropriate for the accomplishment of a legitimate object within the domain of the police power. The General Assembly cannot arbitrarily interfere with the enjoyment of rights guaranteed by the constitution and cannot invest any board or commission with arbitrary discretion which may be exercised in the interest of a favored few or which affords opportunity for unjust discrimination. (*Noel v. People*, 187 Ill. 587.) Every citizen has a right to be governed by fixed rules and cannot be subjected to the will or caprice of an administrative board. (*Ruhstrat v. People*, 185 Ill. 133; *People v. Wilson*, 249 id. 195; *Haller Sign Works v. Physical Culture Training School*,

id. 436.) The act provided for examinations of persons applying for licenses to practice medicine, and, as to those desiring to practice medicine and surgery in all its branches, prescribed general rules for an examination. As to those who desired to practice any other system or science of treating human ailments, who did not use medicines internally or externally or practice operative surgery, it required that examinations should be of a character sufficiently strict to test their qualifications as practitioners. That provision, standing alone, conferred upon the State Board of Health arbitrary power to grant or refuse licenses in its own discretion and upon its own judgment as to what examination would be sufficient to test the qualification of each applicant for a license. It furnished no standard and no guide and no security to an applicant by which the courts could determine whether the requirements of the board were reasonable or not. The act, however, provided that all examinations should be conducted under rules and regulations prescribed by the board, which should provide for a fair and wholly impartial method of examination. Such rules and regulations, if made, would be subject to review by the courts to determine whether reasonable or not. (*Kettles v. People*, 221 Ill. 221.) Considering the provision of the statute for the adoption of rules and regulations subject to judicial review, under which examinations should be made and licenses issued, the statute did not violate any constitutional right. The record does not show whether or not any rules and regulations were adopted by the board, and it affords no means for determining whether any constitutional right of the defendant was violated by unreasonable or arbitrary rules and regulations with which he could not be compelled to comply.

The judgment is reversed and the cause remanded.

Reversed and remanded.

(No. 12653.—Reversed and remanded.)

JOHN P. O'CONNOR *et al.* Appellants, *vs.* THE HIGH SCHOOL BOARD OF EDUCATION OF EVANSTON HIGH SCHOOL DISTRICT *et al.* Appellees.

Opinion filed April 15, 1919—Rehearing denied June 6, 1919.

1. SCHOOLS—*when proposition to purchase new high school site is not properly submitted.* A proposition to purchase a new high school site in not properly submitted at an election where it is so combined with propositions to build a new high school and for a bond issue that a voter who favors one proposition will, in order to vote for it, have to vote for the others also. (*People v. Chicago and Eastern Illinois Railroad Co.* 270 Ill. 594, followed.)

2. SAME—*voters must have opportunity to vote on single question of authorizing purchase of new school site.* The authority of a high school board of education to purchase a new school site must be given by a majority vote of the people of the district voting at an election, where the direct proposition to authorize the purchase of a site is expressly submitted to the voters in such a manner that they may vote upon that proposition alone.

3. SAME—*power of high school board in selection of school site.* A high school board of education has no power to control or limit the action of the voters in the selection of a school site and the law places no restriction thereon except to require a majority vote to make the selection, but if no site receives a majority of the votes cast the site may be selected by the board, subject to the restriction that it shall be at a point convenient to a majority of the pupils of the township.

4. SAME—*proviso to section 38 of School law of 1889 applies to any district coming within its description.* The proviso to section 38 of the School law of 1889, added in 1891, designating what shall constitute a school township in cities lying within two or more townships, is not limited to high school districts thereafter established but applies to any high school district coming within its description, and, although at the time the proviso was enacted the high school was in a village, the proviso operates to create the designated school township upon the incorporation of the village as a city.

5. SAME—*high school board cannot call an election to authorize purchase of building or site except upon petition of voters.* Under section 127 of the School law, high school boards in districts having a population of more than 1000 and not exceeding 100,000, although having the powers and duties of school directors, cannot

lawfully call an election for the purpose of authorizing the building of a new high school and the purchase of a site except in pursuance of a petition signed by not fewer than 500 legal voters or by one-fifth of all the legal voters of the district.

6. SAME—*School law must be construed as one act.* Although the School law consists of different articles and sections it must be construed as one entire act.

7. ELECTIONS—*meaning of constitutional requirement that all elections shall be free and equal.* The constitutional requirement that all elections shall be free and equal means that the vote of every qualified elector shall be equal in its influence with that of every other vote.

8. STATUTES—*when proviso may operate as a substantive enactment.* Although the legitimate office of a proviso is not to enlarge the enactment to which it is appended and operate as a substantive enactment, it will be given that effect if such was the plainly expressed intention of the legislature.

9. SAME—*the General Assembly cannot bind its successor as to method of repealing an act.* One General Assembly cannot bind its successor as to the specific manner in which it must word an act repealing or modifying a previous act, as one legislature has power to repeal or modify acts passed by a former legislature; and this power may be exercised either by expressly declaring the intention of the legislature to repeal the act or by subsequent repugnant provisions.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

HOWARD T. WILCOXON, and WILLIAM SHERMAN CARSON, for appellants.

WILSON, MOORE & McILVAINE, (NATHAN G. MOORE, of counsel,) for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

The Appellate Court for the First District affirmed the decree of the circuit court in this case and granted a certificate of importance, upon which a further appeal is prosecuted to this court.

Two bills were filed by appellants in the circuit court but were consolidated and disposed of in one decree. Both bills attacked the validity of two elections held in the Evanston High School District,—one November 6, 1915, the other December 11, 1915,—upon the questions of choosing a new site for a school building and the issuance of bonds to purchase the site and erect the building. The first bill filed contained the necessary statutory requirements for a contest of the election held December 11 and for a re-count of the ballots cast at that election. The second bill filed by the same parties alleged they had previously filed a bill asking, among other things, for a re-count of the ballots; that it contained all allegations necessary to a petition for contesting the election of December 11 and was filed within the time required by statute for contesting elections, but complainants fearing it might not be sufficient to permit all the proceedings of the board in calling the election, and prior to and leading up to the same, to be fully inquired into, the second bill was filed in order that the proceedings pertaining to the abandonment of the present high school site and the selection of a new site might be examined, considered and adjudged with reference to their conformity to law and with reference to their validity. The prayer of the two bills was the same, and they asked that the elections be declared to be null and void and the board of education restrained from preparing or negotiating bonds or using the proceeds of any tax for the purchase of a school house site, except that the first bill prayed for a re-count of the ballots cast at the election held December 11, 1915. The bills were answered, consolidated and heard together. The cause was heard, the ballots produced in court and counted, and the court found and decreed that the new site, called the Ridge avenue site, received a majority of all the votes cast, and the relief prayed for in each of said bills was denied. The complainants prosecuted an appeal to this court, and it was held we had no jurisdiction,

nor had the circuit court jurisdiction, of any statutory contest of the election; also that the public revenue was not directly involved and the appeal should have been taken to the Appellate Court. It was accordingly transferred to that court. (*O'Connor v. High School Board*, 278 Ill. 618.) The Appellate Court appears to have understood the decision of this court to be that no relief could be had in equity against any action of the high school board in holding the elections, and reversed the decree of the circuit court and remanded the cause, with directions to that court to dismiss the bills for want of jurisdiction. This court granted a writ of *certiorari*, and the case was again brought here for review. We held that the bills raised questions as to the validity of said elections, other than a statutory contest of the election, of which the court had jurisdiction, and that the errors assigned on the court's refusal to grant the relief prayed for and decreeing that the elections were lawfully called, held and conducted, and that the board was lawfully authorized to purchase the site, issue bonds and appropriate the proceeds, or part thereof, to purchase said proposed site, and dismissing the bill, should have been considered by the Appellate Court. The judgment of the Appellate Court was therefore reversed and the cause remanded to that court, with directions to consider the errors assigned. *O'Connor v. Evanston High School District*, 285 Ill. 120.

On the 12th of October, 1915, appellees, the board of education for the high school district, adopted a resolution declaring the present high school site and building unsuitable and inconvenient, and on October 16, 1915, called for an election to be held November 6, 1915, for the purpose, as stated in the notices, of voting for or against the proposition to build a new high school building for said district and upon such new site as might be thereafter selected according to law, and to issue \$500,000 in bonds for the purpose of purchasing such new site, when selected, and

of paying the cost of building a new high school building. The ballots were canvassed and both propositions declared to have been carried by a majority of the votes cast. On the 12th of November, 1915, appellees adopted a resolution ordering that an election be held December 11, 1915, for the purpose of selecting a new site for the proposed high school. Notice was given of the election to be held that day for the purpose of selecting a new site for said school building. The ballot used at that election contained a description of three new sites, with a square opposite each one for the voter to designate his choice. The present site was not mentioned but the ballot contained a blank space with a square opposite, presumably to be used by voters who wished to vote for some site other than the three described. The Ridge avenue site was declared to have received a majority of all the votes cast on the question of site. At the election held on November 6, 1915, no site for the proposed new building was voted upon. The notice stated the election was held "for the purpose of voting for or against the proposition to build a new high school building in and for said district upon such new site as may be hereafter selected according to law, and also for the purpose of voting for or against the proposition to issue school building bonds of said district to the amount of five hundred thousand dollars (\$500,000) for the purpose of purchasing such new site when selected and of paying the cost of building a new high school building on such new site." A majority of the votes cast at said election were declared to have been in favor of both propositions, and the election of December 11, 1915, was held for the purpose of voting upon the selection of the site.

Appellants contend (1) that the elections held in November and December did not confer any legal right or authority upon appellees to purchase a new site for the school building; that such authority could only be conferred by a vote of the people at an election called and

conducted as required by section 198 of the School law; (2) that the form of the proposition to build on a new site submitted by notice of the election held November 6, 1915, was insufficient and illegal, in that voters were limited and confined to voting upon building on a new site, thereby eliminating from the consideration of the voters the present or old site; (3) both elections were void because there was no petition of voters for such elections preceding the elections; (4) the site chosen is illegal because not centrally located; (5) the election of December 11 was invalid because persons not residing in the high school district were permitted to vote at said election, and under the facts stipulated the result would have been different if they had not been permitted to vote.

It is admitted by appellees that they had no authority to purchase a school house site unless authorized to do so by vote of the people of the district, but they contend they were so authorized by the election of November 6, 1915. This is denied by appellants. Section 91 of chapter 122 of Hurd's Statutes, as amended in 1913, in part reads: "For the purpose of building school houses, supporting the school and paying other necessary expenses, the territory for the benefit of which a high school is established under any of the provisions of this act, shall be regarded as a school district, and the board of education thereof shall, in all respects, have the power and discharge the duties of school directors, for such district." (Laws of 1913, p. 583.) Section 119 of the same chapter as amended in 1915 provides: "It shall not be lawful for a board of directors to purchase or locate a school house site, or to purchase, build or move a school house, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 198 of this act. A majority of the votes cast shall be necessary to authorize the directors to act. If no locality shall receive a majority of the votes, the directors may select a

suitable site. The site selected by either method shall be the school site for such district." (Laws of 1915, p. 639.)

The first question presented for our consideration is whether appellees were authorized by a vote of the people to purchase a site for a high school building. Appellees adopted a resolution on October 12, 1915, that the present high school site and building were "unsuitable and inconvenient," and on the 16th of October called an election to be held November 6, 1915, for the purpose, as stated in the notices, "of voting for or against the proposition to build a new high school building in and for said district upon such new site as may be hereafter selected according to law, and also for the purpose of voting for or against the proposition to issue school building bonds of Evanston Township High School District to the amount of five hundred thousand dollars (\$500,000) for the purpose of purchasing such new site when selected and paying the cost of building a new high school building on such new site." The direct proposition to authorize the purchase of a site was not expressly submitted to the voters, but the appellees contend it was necessarily involved in and covered by the proposition to erect a building "upon such new site as may be hereafter selected" and to issue bonds for purchasing "such new site when selected" and paying the cost of the building. The wording of the proposition submitted to be voted upon at the election November 6 is not clear. As the propositions were phrased, if a voter was in favor of the bond issue to erect a new building but opposed to selecting a new site he would very naturally conclude that he would have to vote against the bond issue in order to vote against a new site. On the other hand, if he was in favor of a new site but opposed to a bond issue to pay for it he would have to vote for a bond issue to pay for it or vote against a new site. The propositions were so interwoven that a voter who favored one proposition would, in order to vote for it, have to vote for the other also. The

propositions of a new building to be paid for by a bond issue and to authorize the purchase of a new site should have been submitted in such manner that a voter would readily understand how to vote for one proposition and against the other if he so desired. It may be, as counsel for appellees insist, that the vote for the proposition to build on a new site when selected and purchase it out of the proceeds of a bond issue would imply authority to purchase, but such authority should not rest on implication. The proposition to authorize appellees to purchase a new site should have been so clearly and unmistakably stated that a voter could vote for or against that proposition alone, without reference to how he wished to vote on the question of erecting a new building and issuing bonds to pay for it. The way the questions were submitted the question of a bond issue was linked with both the propositions to build and to select a new site. It is conceivable that a voter might desire to vote for a new building and bond issue to pay for it, or for a new site but against a bond issue to pay for the new site, preferring that be done by a tax levy. It is also conceivable that a voter might favor a new building to be paid for by a bond issue and oppose the selection of a new site because he preferred that the new building be erected on the old site. It would be difficult to determine how such a person could vote and have his wish given expression and effect. It seems apparent that appellees assumed they had, by their resolution declaring the present site and building unsuitable and inconvenient, made the selection of a new site necessary and eliminated the present site from consideration. At least the propositions submitted to be voted upon would indicate that such was their purpose and intention, and they were so framed as to make it difficult, if not impossible, for voters to vote for a new building without also voting to select a new site. The constitution requires that all elections shall be free and equal, which means that the vote of every qualified elector shall be equal in its

influence with that of every other one. (*People v. Election Comrs.* 221 Ill. 9.) As the propositions were submitted at the election November 6, a voter desiring to vote for one of them and against another had not an equal opportunity and influence with the voter who either favored or opposed all the propositions submitted.

Upon the question whether, in any event, by the election of November 6 appellees were given authority to purchase a school house site, *People v. Chicago and Eastern Illinois Railroad Co.* 270 Ill. 594, seems very much in point. In that case an election was held on the questions of erecting a new high school building, to be paid for by a bond issue of \$35,000, and the selection of a site. A majority of the votes cast at the election were against erecting a new building and issuing bonds. A majority of the votes cast on the selection of a site were in favor of what was designated the Ellsworth site. The board of education thereupon secured an option on the purchase of said site for \$7500 and levied a tax to pay for it, judgment for which was applied for by the collector and objected to by the taxpayer. This court held the statute in positive and unequivocal language made the board's power to purchase or select a school site dependent upon its being authorized to do so by a majority vote of the voters voting at an election held for that purpose. The court said: "The voters of such a district at that time not only had the right and privilege of voting on the proposition of selecting a site but also on the proposition of purchasing a site. The added proviso has only taken one of those privileges away from the voter,—the privilege of selecting a site,—and then, only, when the voters fail, by a majority vote, to select the site themselves. The statute as amended must be construed as giving the voters of the district the privilege of voting for or against the purchase of a building site, and the board of education cannot, in any case, purchase a site unless authorized by a majority of the voters voting at an election

for that purpose. In this case the record shows that the voters of the district in question never had the privilege of voting on the question for and against purchasing a school house site. The nearest they were privileged to do that under the notice of the election was to vote 'for a site for said high school.' What interest had any voter, if there were such voters, in voting 'for a site for said high school' who was utterly opposed to purchasing or selecting any site whatever? The board had no right to assume that all voters were in favor of selecting some site and of purchasing some site or other and refuse to submit to them the right to vote on the proposition for or against purchasing a school site." To the same effect, in principle and substance, are *Greenwood v. Gmelich*, 175 Ill. 526, and *Board of Education v. Carolan*, 182 id. 119.

The election of November 6 did not authorize appellees to purchase a site nor did the election of December 11. That election was held for the purpose of locating the site, it being assumed the previous election authorized appellees to purchase it when selected.

Some questions are raised which should be decided for the guidance of the board in the event of another election being held to vote on the questions here involved.

The site receiving a majority of the votes cast is designated the Ridge avenue site. It is well to the northern part of the high school district and near the line forming the north boundary of Evanston township and the south boundary of New Trier township. It was stipulated that the present location of the high school is not far from the geographical center of Evanston and a little more than one block from the high school population center. We have been unable to find any statement of the distance the Ridge avenue site is from the present location of the high school building, but from a plat in evidence it appears to be fifteen or more blocks north of the present site. Appellants contend that the site at Ridge avenue could not be legally se-

lected because it is not at a "central point most convenient to a majority of the pupils of the township." The board of education is only authorized to select a site when at an election held to select a site no locality receives a majority of the votes cast, in which event the board may select a suitable site. Section 86 of the School law makes it the duty of the high school board of education to establish "at some central point most convenient to a majority of the pupils of the township," a high school. This restriction is placed on the selection of a site by the board, and no such restriction is placed on the voters in the selection of a site at an election held for that purpose. Such a limitation was not thought necessary in the selection of a site by the voters, for it can hardly be imagined that a majority of the voters of the district would select a site remote and inconveniently located for the majority of the pupils of the township. The board of education has no power to control or limit the action of the voters in the selection of a site, and the law has placed no restriction upon the selection by the voters except to require a majority vote to make the selection. If no site receives a majority of the votes cast the site may be selected by the board, in which case it shall select a site "at some central point most convenient to a majority of the pupils of the township."

Prior to 1892 Evanston was a village and then included in its boundaries the disputed territory in Niles and New Trier townships. The township of Evanston lies wholly in the now city of Evanston, the organization having been changed from a village to a city in 1892. By act of 1857 the township of Evanston was constituted a township for school purposes and its boundaries described. Two years later some territory was disconnected and attached to New Trier township. In 1882 Evanston high school was established as a high school for Evanston township under the act of 1879. That act did not provide for a board of education to control and manage the high school but such con-

trol and management were in the trustees. In 1890 a board of education was elected as authorized by the act of 1889, consisting of five members, since which time the school has been under the control and management of such board of education. The appellees contend that as the parts of New Trier and Niles townships in dispute were a part of the village of Evanston before and at the time it was incorporated as a city, in 1892, the whole territory automatically became the high school district by virtue of the act of the legislature in 1891.

Section 38 of the School law of 1889 made provision for calling an election to vote for or against the organization of a township high school. That section was amended in 1891 by adding to it: "*Provided*, that when any city in this State, having a population of not less than 1000 and not over 100,000 inhabitants, lies within two or more townships, then that township in which a majority of the inhabitants of said city reside shall, together with said city, constitute a school township under this act for high school purposes." (Laws of 1891, p. 200.) In 1909 the act concerning schools was revised, and the proviso quoted became section 90 of the revised act. It is not contended that when the proviso was enacted, in 1891, it applied to Evanston, which was then a village, and by its terms the proviso only related to cities, but it is insisted that when in 1892 Evanston became a city the act then applied and the whole territory within the city limits became the high school district. Appellants contend that the proviso must be considered in connection with the section to which it is attached,—the organization of high schools,—and it should be limited in its application to township high schools thereafter established; that to construe the provision as contended for by appellees would give it a retroactive effect, which would be unauthorized, because no purpose of the legislature is expressed or can be inferred to make the act retrospective.

At and before the time of its incorporation as a city Evanston had a population of not less than 1000 and not more than 100,000 and lay within two or more townships,—i. e., Evanston, Niles and New Trier. The amendment was attached to section 38 of the act of 1889, which authorized calling an election to vote for or against the organization of a township high school. Aside from the fact that at the time the amendment was enacted, in 1891, Evanston was a village and by its terms the amendment was limited in its application to cities, the amendment accurately describes the situation of Evanston, and provides that in such city the township in which a majority of its inhabitants reside shall, together with said city, constitute a township high school “under this act,”—not “under this section,”—for high school purposes. While it was an amendment in the form of a proviso attached to section 38, its application was not by its terms limited to the section but applied to the act concerning the establishment of township high schools, and though the legitimate office of a proviso is not to enlarge the enactment to which it is appended and operate as a substantive enactment itself, it will be given that effect if such was the plainly expressed intention of the legislature. (*In re Day*, 181 Ill. 73.) In the case of *Trustees of Schools v. People*, 161 Ill. 146, and *People v. Bruenemer*, 168 id. 482, the proviso was given the effect of independent legislation. In the revision of the School act in 1909 the proviso was re-enacted as section 90.

Counsel for appellants concede the legislature had the power to change or modify the district, but argue that before that effect will be given the amendment it must clearly appear that such was the intention, and further contend the language of the enactment will not admit of that construction; that if the legislature had intended it to apply to high schools already established it could have so indicated by the addition of a few words. With as much force it may be said if the legislature had intended the act should

apply only to districts thereafter established it could have said so. We see no valid reason for restricting the benefits of the legislation to districts thereafter established, and its language does not, to our minds, indicate that it was so intended. As we view it, the intent was that it should apply to any high school district that came within its description, and the enactment of the proviso as independent legislation in the revision of 1909 would seem to indicate such was the intention of the legislature.

Our attention is called to the act of 1857 changing the boundaries and the name of the township from Ridgeville to Evanston and to constitute the same a township for school purposes. The act contained a provision that no act, general or special, relating to school purposes, afterward enacted, should affect or repeal any of the provisions of that act unless specifically mentioned in the repealing act. The act of 1857 was not mentioned in the act of 1891. We do not understand one General Assembly can bind a subsequent one as to the specific manner in which it must word an act repealing or modifying a previous act. The legislature has power to repeal or modify acts passed by a former legislature, and this power may be exercised either by expressly declaring its intention or where the intention is inferred from subsequent repugnant legislation.

We are disposed to hold that the disputed territory in Niles and New Trier townships is a part of the high school district, and the residents of that territory had a right to vote at the elections.

Appellants contend both elections were void because they were not called pursuant to a petition of voters, as required by section 127 of the School act. It was stipulated that no petition of voters preceded the call of the election, but appellees contend that section 127 does not apply and that no petition was necessary. If the provisions of section 127 were applicable then the elections were unauthorized and invalid because no petition of voters was

filed asking that an election be called. The basis of appellees' contention is that they constitute a township board of education, which was created under the act of 1889, consisting of five members, and that such a board is to be distinguished from boards of education for districts having a population of not less than 1000 nor more than 100,000, consisting of six members and a president; that the powers of the appellee board of education are to be found in the statute relating to school directors, and it makes no provision for a petition for such election. (Chap. 122, sec. 91, *supra*.) Section 123 is as follows: "In all school districts having a population of not fewer than 1000 and not more than 100,000 inhabitants, and not governed by special acts, and in such other districts as may hereafter be ascertained by any special or general census to have such population, there shall be elected a board of education to consist of a president, six members, and three additional members for every additional 10,000 inhabitants." Section 127 provides: "The board of education shall have all the powers of school directors, be subject to the same limitations, and in addition thereto they shall have the power, and it shall be their duty: * * * To buy or lease sites for school houses with the necessary grounds: *Provided, however*, that it shall not be lawful for such board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all the votes cast at an election called for such purpose in pursuance of a petition signed by not fewer than 500 legal voters of such district, or by one-fifth of all the legal voters of such district."

When the high school district was organized its management passed under the control of the board of education, with powers and duties of school directors for the district. The high school district has a population of more than 1000 and not exceeding 100,000, and if the proviso to section 38 applied it would seem sections 123 and 127

applied also. We are of opinion that the appellee board of education, as successor to the school directors, is subject to the provisions of the statute referred to, and could not lawfully call the election except pursuant to a petition of voters, as provided by section 127. It was held in *Greenwood v. Gmelich, supra*, that although the School law consists of different articles and sections it must be construed as one entire act.

The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause remanded to the circuit court for further proceedings and decree in harmony with the views expressed in this opinion.

Reversed and remanded.

(No. 12209.—Reversed and remanded.)

CHARLES PAULY *et al.* Defendants in Error, *vs.* THE
COUNTY OF MADISON, Plaintiff in Error.

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

1. COUNTIES—the duty of building court houses is imposed on boards of supervisors. An imperative duty is imposed by law upon boards of supervisors to provide court houses for use of counties.

2. SAME—committee of board of supervisors cannot bind board without authority. Supervisors have no power to act individually but they must act together as a board in order to represent the county, and there is no power to bind the county by an architect or committee appointed by the board unless authority has been given by the board.

3. SAME—persons dealing with agent of county must know the extent of the agent's authority. All persons assuming to act as the official agents of a county must have the requisite authority for that purpose, otherwise the county will not be bound, and any person dealing with them must know at his peril the extent of their authority.

4. SAME—for what services architects may recover under contract with the county. Where a building committee of a board of supervisors is authorized to contract with architects for plans for an addition to the court house and the report of their contract is

adopted by the board the architects may recover for the amount of services rendered under such contract but not for preparing plans, at the direction of the committee, for an entirely new court house, where the county board has neither authorized nor ratified the committee's action in that respect.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding.

J. F. ECK, for plaintiff in error.

D. H. MUDGE, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the Fourth District affirmed the judgment recovered in the circuit court of Madison county by the defendants in error, Charles Pauly and Edward C. Pauly, partners under the name of Chas. Pauly & Son, against the county of Madison for \$5062.50 for services as architects under a contract with the building committee of the board of supervisors. A writ of *certiorari* was ordered for a review of the judgment of the Appellate Court.

At the meeting of the board of supervisors of the county of Madison held on December 1, 1909, the public building committee of the board submitted a report relative to improvements on the court house. The report recited at length the crowded condition of the county offices and the inadequacy of the rooms provided for the courts, with the prospect of being required to furnish further space for a probate judge and probate clerk after the next election, and stated that the revenue of the county at that time, without increasing the tax rate, would enable the board to appropriate and expend \$50,000 per annum for improvements of the court house until they should be completed.

The committee presented and recommended the adoption of the following proposition: "To build a wing on the south side of the present building, three stories high, to cost about \$50,000. After same is complete to the extent of a temporary occupancy, to move the offices from the center part to the south wing and then demolish the center portion and re-build same to conform with the south wing. This avoids renting any outside space. After completing the center part then remodel the north wing to make it conform with the balance of the building, the result being practically a new building three stories high, with all modern improvements and the appearance of a stone court house with architecture up to date." The report concluded with the statement that the total cost of the contemplated improvements would be covered by \$150,000, which would mean an expenditure of \$50,000 for a period of three years, building only each section, as above enumerated, annually. The committee asked for authority to secure the services of a competent architect and to make a contract with him to supervise and superintend that improvement on a basis that was customary, the committee to submit to the board the plans for approval and adoption, subject to alteration if not meeting the approval of the board. The report was adopted, and in pursuance of the authority given, the building committee on December 6, 1909, entered into a contract with plaintiffs, reciting that whereas the county was about to erect an addition to the Madison court house, the plaintiffs agreed to prepare the plans and specifications for the building, to make all necessary drawings, to procure estimates from builders and contractors for the construction, and, by and with the consent of the county, to let the contract to the lowest responsible bidder and to superintend the construction of the building. The county was to pay five per cent of the aggregate amount of all contracts, but if superintending the structure by plaintiffs should be dispensed with they were to receive

three per cent of the aggregate amount of all contracts. At a meeting of the board on January 6, 1910, the building committee submitted a report relative to the proposed improvements on the court house, stating that it had secured the services of the plaintiffs and made a contract with them for plans on the customary basis of three per cent of the cost of the building and five per cent if the plaintiffs did the superintending, and that the committee had visited Springfield, Decatur, Lincoln and Bloomington and got a great deal of valuable information by inspecting buildings and getting ideas for plans. The report was adopted and the contract thereby approved. At a meeting of the board on February 3, 1910, there was a discussion of the court house proposition, and the board was informed by the building committee that the Illinois Traction System had chartered a car "free gratis" for the whole board to visit Springfield, Lincoln and Bloomington. At a meeting of the board on March 10, 1910, the resolution of a mass meeting held that day was received and spread of record opposing the proposed plan for remodeling the court house and against the present site and in favor of a new court house and a new site to be donated by the citizens of Edwardsville, favoring a bond issue and demanding open competition in every phase of the work, including the employment of architects, contractors and furnishers. This resolution amounted to a protest against the previous action of the board and the proposed plan and demanded open competition in the employment of architects for a new court house as well as contractors and furnishers. At some time after that mass meeting the committee instructed plaintiffs to prepare plans for a new court house, for which no authority had been given. The plaintiffs prepared plans for such new court house, estimated to cost \$225,000 without heat, light or plumbing, which would amount to about \$25,000 additional. At a meeting of the board on August 9, 1910, the building committee submit-

ted the plans and specifications prepared for a new court house, and the building of the proposed new court house was referred to the judiciary committee, to act in conjunction with the State's attorney and have the proposition voted on at the November election, 1910. At a subsequent special meeting of the board the judiciary committee reported that it had agreed upon a resolution providing for erecting a new court house at the present court house site in Edwardsville, the question of issuing county bonds therefor to the amount of \$350,000 to be submitted to a vote of the people at the election on November 8, 1910, and that report was adopted. The proposition was submitted at the election and defeated. At the January, 1911, meeting of the board the building committee made a lengthy report reviewing the various proceedings, stating that the bond issue had been voted on and defeated; that the cost of a new court house would be about \$225,000; that after the mass meeting, in March, 1910, the committee believed the public desired practically a new building and had instructed the plaintiffs to prepare plans accordingly, which were presented to the board. The committee recommended that the plans prepared by plaintiffs be accepted and the building committee authorized to advertise for bids in accordance with the plans and proceed with building operations. The report was laid on the table until the next regular meeting. At the February, 1911, meeting, the chairman of the building committee moved the adoption of the committee report for remodeling the court house, with an amendment authorizing the committee to advertise for bids for a contract to build a new court house, the cost of the building not to exceed \$250,000. On a vote the motion was lost.

The declaration contained the common counts for labor, services and materials and two special counts setting out the contract *in hæc verba*, alleging the ratification of the same by the board on January 6, 1910, performance

by the plaintiffs in accordance with the contract, and the wrongful failure, neglect and refusal of the county to proceed with the construction of the building. The trial was before the court without a jury, and there were frequent objections to evidence as irrelevant and incompetent, but everything offered was admitted subject to objection, and there is no method of determining what was regarded by the court as competent and relevant. In this opinion, however, all the facts proved by legitimate evidence are stated and it will not be necessary to consider objections made to evidence.

The court held a proposition of law that the plaintiffs were not barred from recovering because of the fact that the plans and specifications made did not call for a reconstructed building or a building built in additions, on account of the acts of the board at the meetings held in January, February and March, 1910, above stated. There was nothing in any act of the board justifying such a holding. Among the duties imposed by law on boards of supervisors is the duty to build court houses, and it is their imperative duty to provide the same for the use of the county. (*Andrews v. Board of Supervisors*, 70 Ill. 65; *County of Coles v. Goehring*, 209 id. 142.) Supervisors have no power to act individually, and it is only when convened and acting together as a board that they represent and bind the county by their acts. (*Bouton v. Board of Supervisors*, 84 Ill. 384; *Marsh v. People*, 226 id. 464.) There is no power to bind the county by an architect or committee appointed by the board unless authority has been given by the board. (*Sexton v. County of Cook*, 114 Ill. 174.) All persons assuming to act as the official agents of a county must have the requisite authority for that purpose, otherwise the county will not be bound, and everyone dealing with them must know at his peril the extent of their authority. (*Scates v. King*, 110 Ill. 456.) The county board gave authority to its building committee to secure the services of

competent architects to prepare plans and specifications for alterations and improvements of the court house, as specified in the report of the building committee on December 1, 1909. By virtue of that authority the committee on December 6, 1909, entered into the contract with the plaintiffs to prepare plans and specifications for the contemplated addition to the court house. There was authority to make the contract and it was ratified and confirmed by the board. After the demonstration by the mass meeting in March, 1910, the committee instructed the plaintiffs to prepare plans for a new court house, for which no authority had been given. When the committee reported to the county board at the January, 1911, meeting that it had instructed the plaintiffs to prepare plans for a new court house the report was laid on the table until the next meeting, and at the next meeting the motion to amend the committee's report so as to authorize a new building was defeated. There was no evidence tending to prove ratification of the unauthorized act. The court held another proposition of law that the plaintiffs, in dealing with the committee, were required to know at their peril the extent of its authority; that the building committee had no authority to bind the county for plans and specifications for a court house that would cost \$225,000 and would have to be constructed all at one time, and the plaintiffs could not recover unless it was shown that the plans were in accordance with the contract entered into with the committee and that the board ratified the contract with full knowledge of all the material facts. This statement of the law was correct, but it appears that the court concluded there had been a ratification, of which there is no evidence. There was no right to recover for plans and specifications designed for a new court house.

To prove their damages the plaintiffs introduced evidence of the amount of work done both before and after the change from the plans provided by the contract, includ-

ing those made for a new court house. Edward C. Pauly testified that after the contract was made the plaintiffs proceeded to prepare plans and specifications for the addition to the court house and consulted with the committee and made numerous sketches from ideas suggested from time to time, and that this continued for eight or nine months. For any services rendered in pursuance of the contract to make plans for an addition to the court house according to the proposition submitted by the building committee to the board of supervisors and adopted by the board the plaintiffs would be entitled to recover. This is so notwithstanding the fact that the plans were afterward changed by direction of the committee and the unauthorized order was given to prepare plans for a new court house. The evidence furnished no information as to the time when the change was made or the amount or value of the work done in pursuance of the contract in making plans and specifications for the addition.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

(No. 12470.—Judgment affirmed.)

THE G. H. HAMMOND COMPANY, Plaintiff in Error, *vs.*
THE INDUSTRIAL COMMISSION *et al.*—(DAVID EICHBERG, Admr., Defendant in Error.)

Opinion filed April 15, 1919—Rehearing denied June 4, 1919.

I. WORKMEN'S COMPENSATION—*when death results from injury and not from intervening cause.* Where an employee is injured by a barrel of meat falling on his leg, the injury subsequently develops an abscess necessitating treatment at a hospital, where he suffers further injury by a fall while getting out of bed, breaking his leg where the abscess had attacked the bone, his death from shock when operated on six days later is properly regarded as due to the injury rather than to the intervening cause.

2. SAME—*employer who denies liability cannot, after award is made, elect to pay compensation to deceased's beneficiaries.* The provision of paragraph (f) of section 7 of the Workmen's Compensation act that compensation for an injury resulting in death may, at the option of the employer, be paid either to the personal representative of the deceased or to his beneficiaries, does not apply where the employer denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under the statute.

3. SAME—*when Industrial Commission is not required to declare proportion of award to each of beneficiaries.* Where compensation is awarded on an administrator's claim for an injury which results in death, paragraph (f) of section 7 of the Workmen's Compensation act authorizes the distribution to be made under the order of the court appointing the administrator, and where the beneficiaries are the wife and children of the deceased the Industrial Commission is not required to find and declare the proportion of the award each of the beneficiaries shall receive.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

T. M. COEN, for plaintiff in error.

SCOTT OSTEN CAVETTE, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

The circuit court of Cook county confirmed an award made by the Industrial Commission against the G. H. Hammond Company in favor of the administrator of the estate of Wowzymec Bonkowski, and certified that the case was a proper one to be reviewed by this court.

Bonkowski was employed by plaintiff in error November 9, 1914. His work was loading and unloading barrels of meat. He continued to work until the 16th of November, after which time he did not do any more work. He returned to his home after the last half day he worked for plaintiff in error, lame, complained of his leg hurting him, said he was sick and went to bed. Nine days later he was taken to the Cook County Hospital. The surgeon who treated him there testified that he had an abscess on the

left thigh which contained pus. The doctor opened it and drained the pus. He testified the abscess was the result of an injury to the leg. After it was drained the patient got better but later osteomyelitis developed, necessitating an operation on the bone, which weakened the bone. When the operation was performed, January 15, 1915, Bonkowski was pale, anæmic, had lost flesh and could hardly walk. His general physical condition, due to infection, was run down and weakened and his vitality and powers of resistance lowered. The attending physician ordered him kept in bed, but subsequently an interne in the hospital permitted him to get out of bed. He fell and broke the bone at the place where it was diseased, which caused a severe hemorrhage. Afterwards, on September 6, 1915, another operation was performed, and a few hours later Bonkowski died. The doctor testified the death resulted from osteomyelitis, lowered resistance from long illness, hemorrhage and shock. The treatment given Bonkowski he said was necessary.

Plaintiff in error insists that the death was not due to an accident arising out of and in the course of the employment of the deceased but was due to an intervening cause. The testimony shows that November 16, 1914, deceased, with others, was engaged in unloading barrels of meat from a car. A barrel weighing about five hundred pounds was pried from its position on top of other barrels, suddenly fell and rolled, striking deceased, knocking him down and injuring his leg. The proof warrants the conclusion that the abscess which developed and caused deceased's removal to a hospital resulted from that injury. But plaintiff in error contends Bonkowski's death did not result from that injury but was due to his fall in the hospital, which intervened between the accident received where he was employed and the death. The testimony of the physician who treated Bonkowski was, in substance, that the abscess on his thigh was caused by an external injury; that the pus which had

formed had eaten through and destroyed the tissue and blood vessels and attacked the bone, which necessitated cutting and chiseling away a part of the bone. This weakened the bone, and while getting out of bed the limb gave way, Bonkowski fell to the floor and the femur broke at the place it was eaten by disease. He was operated on six days later and died from the shock the same day. The Industrial Commission was warranted by the proof in finding death resulted from the injury. *Bailey v. Industrial Com.* 286 Ill. 623.

It is insisted notice of the injury alleged to have caused the death was not given plaintiff in error within thirty days after the accident, as required by section 24 of the Workmen's Compensation act. The evidence shows that the deceased, while engaged in performing the duties of his employment, was struck by a falling or rolling barrel of meat weighing in the neighborhood of five hundred pounds. The foreman of the men with whom deceased worked testified Bonkowski told him he had been struck by a rolling barrel, had a pain in his leg and could not work any more. The foreman told him to go to the company doctor. Another witness testified to hearing the foreman notified by the deceased of his injury by the barrel. The widow testified he came home sick, complaining that his leg hurt him, and his walk indicated it. The leg was bruised black and blue from about two inches above the knee to the thigh. He was at home nine days before he was taken to the hospital. Mrs. Bonkowski went to plaintiff in error's office twice. She testified there were three men in the office. She could not tell who they were but thought one of them was time-keeper. It was the office where the men got their pay. She asked for half pay for her husband, and told the men in the office her husband was hurt while at his work by a barrel falling on his leg and was in bed. She was not known to the men in the office and they refused to pay her unless she was identified. The statute requires notice

of the accident to be given not later than thirty days after it happens. Notwithstanding the testimony of Mrs. Bonkowski was contradicted by witnesses for plaintiff in error, her testimony and that of other witnesses tends to show that notice of the accident was given within the time required, and that being the case, we cannot reverse the judgment and award, even if we were of the opinion, which we are not, that the finding that notice was given was contrary to the weight of the testimony.

Bonkowski left surviving him his wife and two children. An administrator of the estate was appointed and qualified and filed an application for compensation for a fatal injury to his intestate. The application was heard by an arbitrator October 11, 1916, and award made of \$5.10 per week for a period of 416 weeks, as provided by paragraph (a) of section 7 of the Workmen's Compensation act. The award was confirmed on review by the Industrial Commission. Counsel for plaintiff in error moved the arbitrator to dismiss the proceeding brought by the administrator, and stated plaintiff in error elected, if liable, to make compensation to the beneficiaries of the deceased. The motion was denied, and it is claimed the judgment of the circuit court should be reversed and the award set aside for that reason. The argument in support of this position is that the right to the compensation is vested in the dependents of the deceased, is no part of his estate, and plaintiff in error elected, pursuant to paragraph (f) of section 7, to pay compensation, if liable therefor, to the dependents of deceased. The statute clearly recognizes the right of an administrator to prosecute an application for compensation and collect any award made, and provides that the payment of compensation to the personal representative of the deceased shall relieve the employer of all obligation as to the distribution of the fund, but such distribution shall be made by the personal representative pursuant to the order of the court appointing him. (Sec. 7, par. (f), *supra*.)

Plaintiff in error did not elect to pay an award to anyone without compulsion, so is in no position to invoke the provision of paragraph (f) of section 7 that compensation for an injury which results in death may, at the option of the employer, be paid either to the personal representative of the deceased employee or to his beneficiaries. That provision may be availed of by one who voluntarily pays the compensation, and does not apply where the employer denies liability and refuses to make compensation until he has been adjudged liable in a proceeding conducted under that provision of the statute. (*Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34.) Here plaintiff in error denied liability and it was necessary that an application for adjustment of claim for compensation be filed and determined in the regular way. Plaintiff in error at no time unequivocally elected to pay compensation to the beneficiaries of deceased, but the announcement of its election to pay the beneficiaries was qualified by the condition that it would do so if it was liable to make compensation on account of the death of the employee. Someone had to institute proceedings to determine that question, and the administrator was authorized to do that. Plaintiff in error was in no way injured or prejudiced by the requirement that it pay the administrator. The statute expressly provides that payment to the administrator shall relieve plaintiff in error of all obligation as to its distribution.

The proof showed deceased left a wife and two children. The amount of the award is authorized by paragraph (a) of section 7, and paragraph (f) of said section authorizes the distribution to be made under the order of the court appointing the administrator. The Industrial Commission was not required, therefore, to find and declare the proportion of the award each of the beneficiaries should receive.

The judgment is affirmed.

Judgment affirmed.

(No. 12546.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. EVAN KARPOVICH, Plaintiff in Error.

Opinion filed April 15, 1919—Rehearing denied June 5, 1919.

1. CRIMINAL LAW—*court not authorized to instruct jury to find defendant not guilty.* In a criminal case the jury are the judges both of the law and the facts and the trial court cannot entertain a motion to instruct the jury to find the defendant not guilty, but it is proper for the judge, if in his judgment a new trial must be granted should a conviction be had, to so advise the prosecutor, that he may exercise his official judgment and discretion.

2. SAME—*defendant cannot complain of error in entertaining a motion to instruct jury to find him not guilty.* The trial court's error in instructing the jury to find the defendant not guilty as to certain counts in an indictment cannot be complained of by the defendant, as he has received the benefit of the error.

3. SAME—*when a child under fourteen years may testify in a criminal case.* In a prosecution for taking indecent liberties with a child it lies within the discretion of the trial court to permit the child, who is only eight years of age, to testify if the court is satisfied with the child's mental capacity, as the requirement is not one of age but of understanding, and on review the question whether the child possessed such understanding may be determined from the preliminary examination and her testimony before the jury.

4. SAME—*what testimony by child's mother is not hearsay.* In a prosecution for taking indecent liberties with a child under the age of fifteen years, under section 42ha of the Criminal Code, testimony of the mother of the child that immediately after the child came home she (the mother) went to the place where the alleged offense was committed and looked for the defendant is not incompetent as hearsay nor as tending to impress the jury that the child had complained to her mother about the defendant.

5. SAME—*evidence of complaint made by child is competent under counts charging rape.* In a prosecution under an indictment charging defendant with rape and with taking indecent liberties with a child, under the counts charging rape the child may testify that immediately after the commission of the alleged offense she made complaint to her mother.

6. SAME—*when the defendant cannot complain that evidence proves commission of another crime.* In a prosecution under an indictment charging the defendant with taking indecent liberties

with a child, if the evidence proves the commission of the crime charged in the indictment the fact that it also proves the elements of the crime of assault with intent to commit rape does not make void the conviction for the crime charged.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

GEORGE B. COHEN, (JOSEPH H. LAWLER, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and NOAH C. BAINUM, (EDWARD E. WILSON, EUGENE P. MCGARRY, and GROVER C. NIEMEYER, of counsel,) for the People.

Mr. JUSTICE STONE delivered the opinion of the court:

The plaintiff in error was convicted in the criminal court of Cook county under the fourth count of an indictment charging him with taking indecent liberties with Rose Rozhon, a child of the age of eight years.

The indictment consisted of five counts, the first three of which charged plaintiff in error with the offense of rape, and the fifth of which charged him with having committed certain acts tending to contribute to the delinquency of said child, Rose Rozhon.

At the close of all the evidence the court overruled a motion of the plaintiff in error to exclude the evidence and to instruct the jury to return a verdict finding the plaintiff in error not guilty. Thereupon the plaintiff in error entered a motion to exclude the evidence and direct a verdict of not guilty on the three counts charging rape. This motion was allowed and instructions given by the court to the jury to find the plaintiff in error not guilty on counts 1, 2 and 3 of the indictment, and the jury so found. The cause was submitted to the jury on the fourth and fifth counts of the indictment.

It is contended by plaintiff in error that the trial court erred in overruling his motion to exclude the evidence and in refusing to give the instruction directing a verdict of not guilty as to each and every count in said indictment; that the plaintiff in error was convicted on the uncorroborated evidence of Rose Rozhon, a child of eight years, and that the evidence, taken as a whole, is insufficient to sustain the conviction; that if the evidence tends to prove the committing of any crime it is that of assault with intent to commit rape on the said prosecutrix, which was not charged in said indictment; that the court erred in admitting and refusing testimony and in refusing certain instructions of plaintiff in error.

As to the first contention, the rule in this State is that the trial court cannot entertain a motion to instruct the jury to find the defendant not guilty in a criminal case, for the reason that the jury are the judges of both the law and the facts, although it is proper practice for the court, in case it is his judgment that a new trial must be granted if a conviction is had on any count or counts of the indictment, to so advise the prosecutor, for the exercise of his official judgment and discretion. (*People v. Zurek*, 277 Ill. 621.) While the ruling of the court in instructing the jury to find the defendant not guilty as to the first three counts of the indictment was error, it was not an error that the defendant could complain of, as he received the benefit of it.

It is urged that the court erred in not making proper and sufficient examination of the complaining witness, Rose Rozhon, touching her intelligence and knowledge of the moral and legal consequences of a violation of her oath, before permitting her to testify. The rule obtains as laid down by this court in *Shannon v. Swanson*, 208 Ill. 52, in the following language: "Section 10 of division 2 of the Criminal Code provides that every person who is neither an idiot nor lunatic nor affected with insanity, and who has arrived at the age of fourteen years, shall be considered of

sound mind, and that persons who have not reached that age shall be considered of sound mind if they comprehend the distinction between good and evil. In analogy to this rule of the criminal law a witness who has reached the age of fourteen years should be presumed, *prima facie*, competent. If below that age his competency to testify is to be determined by an inquiry as to the strength of his mental faculties and his power to understand and appreciate the moral duty to speak the truth. This inquiry is to advise the trial judge, whose duty it is to determine whether the person is competent to testify. The decision of this matter may be reviewed, but as the intelligence of the witness is to be ascertained, to some extent, by his appearance and conduct while in the presence of the court, and as the judge is vested with a degree of discretion, it is only when there has been an abuse of discretion or a manifest misapprehension of some legal principle that the decision will be reviewed." The requirement is not one of age but of understanding. Whether such child possessed the understanding necessary to be competent to testify may be determined, on review, from the preliminary examination and her testimony before the jury. (*Featherstone v. People*, 194 Ill. 325.) It appears from the record that Rose Rozhon was examined before the court touching her competency to testify by the State's attorney. It lay within the discretion of the trial court to permit her to testify, and from her answers and her testimony in the case it is evident that there was no abuse of that discretion.

It is very earnestly urged by plaintiff in error that he was convicted on the uncorroborated evidence of Rose Rozhon and that the evidence is insufficient to sustain the conviction. Rose Rozhon testified that on Sunday, August 18, 1918, about noon, the defendant came to her while she was at a lumber pile near her home and pulled her about a block to an office at Homan avenue and Twenty-first street, where the alleged immoral, improper and indecent liberties

detailed by the witness took place; that the plaintiff in error laid her on the floor and lay upon her; that he put his privates in contact with hers; that she screamed and tried to get away; that while they were in the room in question somebody called "Roesky," after which plaintiff in error left the room; that while plaintiff in error was out of the room witness ran away to her home and told her mother of the occurrence; that she never saw plaintiff in error before the day in question; that she pointed him out in the office to the policeman; that plaintiff in error wore black clothes, a white shirt and had a mark on his nose.

Helen Sotana, a witness called on behalf of the State, testified that on the day in question, between eleven and twelve o'clock, while playing on a water pipe, she heard someone say "No!" "No!" "No!" in Bohemian; that she went to the corner and saw plaintiff in error pulling her (Rose); that she had seen plaintiff in error frequently; that he is the man she saw that day; that she could tell by the hat and suit he had on; that they went about one-half block; that she did not see him drag Rose into the office; that about one-half hour later she saw Rose running home; that she was not close enough to identify Rose when she first saw her, but that when she saw her running home she recognized her and could tell by her dress that she was the same child she had first seen.

Annie Sikora testified that on the day in question, at about noon, she went to the office in question with bread and milk for some dogs housed in said building; that she knocked on the door twice and receiving no response from within she opened the door and entered the office; that she called "Roesky," to which plaintiff in error responded, "All right;" that she said, "Here is the bread and milk," and then went home; that plaintiff in error came to her but that she was unable to determine the part of the premises from which he came; that she heard no unusual noises and saw nothing unusual in his dress.

The plaintiff in error testified that while he was at the office in question, at or near the time testified to by the other witnesses, the telephone rang; that he could not speak English and so went to the railroad track for the purpose of meeting someone who could speak English; that he met this little girl, Rose Rozhon, sitting on some wood and asked her in the Russian language if she could speak English; that she answered "Yes;" that he said, "Come along with me and nothing will happen to you;" that she said "No" and then went home; that a patrol wagon came soon thereafter for him; that Mrs. Sikora came to the office, knocked or rapped on the door and called "Roesky," and that he said, "All right;" that when he made the answer he was out in the yard with the dogs; that he went in and met her in the office. The plaintiff in error denied in toto the statement of the complaining witness as to what occurred in the office.

Counsel cite in support of plaintiff in error's contention that the evidence does not support the verdict, the case of *People v. Freeman*, 244 Ill. 590. The proof in this case is to be distinguished from the proof in the *Freeman case*. In that case this court found that the evidence of the complaining witness was not corroborated and was of doubtful credibility. There is nothing in the evidence of the complaining witness nor the physical facts proven which tends to discredit her story. In addition, it is evident from the record that her story does not stand uncorroborated. In her statement that she was pulled into the office by plaintiff in error she is corroborated by the testimony of Helen Sotana that she saw plaintiff in error dragging the prosecuting witness toward said office building and that she later saw her running toward her home. The complaining witness is further corroborated by the testimony of her mother, who stated that the child came home crying. She is further corroborated in her statement that someone called plaintiff in error from the room while they were in the toilet by

the testimony of Annie Sikora, who stated that she called him concerning some food she had for dogs on the premises. This testimony, and numerous circumstances shown in the evidence, tend to corroborate her story. Crimes of this character are usually committed under circumstances that do not admit of corroborative testimony by eye-witnesses. It would be unreasonable to assume that this child could detail the facts and surroundings of this crime so that they would be substantiated by disinterested witnesses if her story were not true. The rule uniformly applied in criminal cases is that the verdict of the jury will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict of the jury is based upon passion or prejudice. (*People v. Lutzow*, 240 Ill. 612; *People v. Deluce*, 237 id. 541; *Cronk v. People*, 131 id. 56; *Steffy v. People*, 130 id. 98.) The jury here were justified from the evidence in believing the defendant guilty beyond a reasonable doubt.

It is also urged that the testimony of Tillie Rozhon, mother of Rose, that she went to the place in question at once after Rose came home, to look for the plaintiff in error, must have impressed the jury that Rose had previously complained to her mother about the defendant, and that the evidence of what she told her mother was clearly incompetent under the fourth count of the indictment, upon which plaintiff in error stands convicted. The rule in this State is that complaint made by the complaining witness to others, and not a part of the *res gesta*, is incompetent as hearsay testimony in all cases except those of rape. (*People v. Scattura*, 238 Ill. 313.) Tillie Rozhon here did not testify that the complaining witness told her what occurred between her and plaintiff in error. Her testimony that she went to the office where plaintiff in error was employed, at once after Rose came home, was not hearsay and was competent. While the complaining witness did testify that she ran home and told her mother what occurred, yet at

the time this testimony was offered and put in evidence the three counts of the indictment charging rape were still issues before the jury and no objection was raised to the competency of such evidence, nor was there a motion made by the plaintiff in error to limit the application of such evidence to those counts charging rape, or to exclude this evidence after the court directed a verdict of not guilty on the first three counts of the indictment, nor was there any instruction offered by the plaintiff in error directing the jury not to consider this evidence in arriving at their verdict on the fourth and fifth counts of the indictment. This evidence was clearly competent under the first three counts of the indictment. *People v. Scattura, supra.*

Plaintiff in error contends that if there is any crime proven it is the crime of assault with intent to commit rape, and that a conviction on the charge of taking indecent liberties with children cannot be sustained if the facts show the crime of assault with intent to commit rape. Plaintiff in error was convicted under section 42*ha* of the Criminal Code, which reads as follows: "That any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or any such person who shall take any such child or shall entice, allure or persuade any such child, to any place whatever for the purpose either of taking any such immoral, improper or indecent liberties with such child, with said intent, or of committing any such

lewd, or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not less than one year nor more than twenty years: *Provided*, that this act shall not apply to offenses constituting the crime of sodomy or other infamous crimes against nature, incest, rape or seduction."

It will be noted that while the crime of rape is expressly excluded from this statute, the crime of assault with intent to commit rape is not excluded. While the crime of taking indecent liberties with children may be shown without proving the crime of assault with intent to commit rape, yet it is impossible to prove the crime of assault with intent to commit rape upon a child under fifteen years of age without proving the taking of or attempting to take "immoral, improper or indecent liberties" with such child with the intent of "gratifying the lust or passions or sexual desires" of at least the person charged with said crime. Proof of these facts establishes the essentials of the crime of taking indecent liberties with children. It follows, therefore, that proof which sustains a charge of assault with intent to commit rape will sustain the charge of taking indecent liberties with children, since the elements of the latter crime are included within those of the former. If the evidence proves the commission of the crime charged in the indictment, the fact that it may also prove the elements of another crime does not make void the conviction for the crime charged. When A is charged with larceny and the proof shows the commission of the crime of robbery such proof will nevertheless sustain a conviction for larceny, as the latter is included within the former. Where the defendant stands charged with one offense and the proof of that offense involves the proof of another offense such proof may nevertheless be received, and a conviction of the crime charged will be sustained notwithstanding the fact that the proof by which such charge was sustained also discloses the

commission of another and separate offense. *Parkinson v. People*, 135 Ill. 401; *People v. Rardin*, 255 id. 9.

Plaintiff in error further contends that the court erred in refusing instructions Nos. 26 and 27 offered by him. These instructions purported to present abstract propositions of law, and were, so far as they presented correct propositions of law, covered by other given instructions.

We have examined the record and find no reversible error in the rulings of the trial court on the admissibility of evidence. The defendant was in open court when sentenced, and sentence was passed upon him according to law.

There being no reversible error in the record the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

(No. 12392.—Judgment affirmed.)

THE PEOPLE *ex rel.* Archie N. Vance, County Collector,
Appellant, *vs.* JAMES BUSHU *et al.* Appellees.

Opinion filed June 18, 1919.

1. ELECTIONS—*requirements of Ballot law are applicable to ballots for voting on hard roads proposition.* Under the revision of the Road and Bridge law in 1913 the ballot to be used at an election for voting on the proposition for or against a tax for the construction of hard roads must conform to the requirements of the Australian Ballot law.

2. SAME—*provision of section 14 of Ballot law requiring signature of clerk is mandatory.* The provision of section 14 of the Ballot law of 1891 requiring each ballot to contain a *fac simile* of the signature of the clerk or town officer preparing the ballots is to prevent the fraudulent casting of spurious or illegal ballots and is essential to the validity of the ballots.

3. SAME—*when mistakes of officers in charge of an election are fatal.* While it is a rule that mistakes or omissions of the officers in charge of the machinery of an election should not defeat the plainly expressed will of the people at such election, yet such rule will not apply where said officers have failed to perform those duties of precaution which safeguard the votes of the people.

APPEAL from the County Court of Edgar county; the Hon. DAN V. DAYTON, Judge, presiding.

WILBER H. HICKMAN, State's Attorney, for appellant.

JAMES K. LAUHER, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a judgment of the county court of Edgar county sustaining objections filed by appellees to a certain tax levied by the highway commissioners of the town of Buck, in said county, for the purpose of constructing, maintaining and repairing gravel, rock, macadam or other hard roads, pursuant to a vote of the legal voters of said town at a special election held February 13, 1917.

Numerous objections were presented in the county court, all of which were sustained. One of the objections to the sustaining of which error is assigned is, that said tax levy is void and of no effect for the reason that there was no legal election on the matter of authorizing the issuance of the bonds and the levy of a tax therefor.

It appears that on the 20th day of January, 1917, a petition signed by the requisite number of land owners and legal voters in the town of Buck, county of Edgar, was filed with the town clerk thereof, asking that a special election be called for the purpose of voting upon the proposition for or against an annual tax of one dollar on each \$100 assessed valuation on the taxable property in said town, for the purpose of constructing and maintaining gravel, rock, macadam or other hard roads. Said election was called and was held on the 13th day of February, 1917. The election was held under the Road and Bridge law as revised in 1913. At the special election the votes showed a majority in favor of said proposition.

Among the objections urged to the tax levy or authority of said special election, it is contended that the ballots used

by the voters at said special election were wholly illegal; that they failed to conform to the requirements of the statute, in that said ballots did not have on the back or outside of the same the *fac simile* of the signature of the town clerk. Under the revision of the Road and Bridge law enacted in 1913 the ballot to be used at such election is made to conform to the Australian Ballot law, and the requirements of that Ballot law are applicable to ballots used in elections under the Road and Bridge law. (*People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 266 Ill. 98.) Section 14 of the Ballot law approved June 22, 1891, concerning the requisites of ballots to be used, provides in part as follows: "On the back or outside of the ballot, so as to appear when folded, shall be printed the words 'Official ballot,' followed by the designation of the polling place for which the ballot is prepared, the date of the election and a *fac simile* of the signature of the clerk or town officer who has caused the ballot to be printed." Section 26 of the Ballot law, concerning the ballots to be used at elections, provides in part as follows: "No ballot without the official indorsement shall be allowed to be deposited in the ballot-box, and none but ballots provided in accordance with the provisions of this act shall be counted."

It is admitted that the ballots used at the election in question did not contain the *fac simile* of the signature of the town clerk on the back thereof. This provision of section 14 is mandatory. Such *fac simile* of the signature of the town clerk or officer preparing the ballots is essential to the validity of the ballots. (*People v. Snedeker*, 282 Ill. 425.) Section 26 of the Ballot law provides that if ballots do not conform to the requirements of that law they shall not be received or counted. As was said in *Parker v. Orr*, 158 Ill. 609: "It was evidently the intention of the legislature to declare what should absolutely destroy a ballot or prevent its being counted, by section 26, *supra*: 'If the voter marks more names than there are persons to be elected

to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot-box, and none but ballots provided in accordance with the provisions of this act shall be counted.' ”

While it has been held by this court concerning many of the mandatory provisions of the statute relating to elections that a substantial compliance therewith is sufficient, yet in this case there has been no attempt to comply therewith, and the rule regarding substantial compliance has no application. While it has frequently been held that mistakes or omissions of the officers in charge of the machinery of an election should not defeat the plainly expressed will of the people at such election, yet such has not been held to be the rule where such officers have failed to perform those duties of precaution which safeguard the votes of the people. It is far better that the people of a town shall lose their vote in a single instance than that there shall be written into the law rules which permit election officers to disregard the plain mandates of those provisions of the law intended to protect and safeguard the ballot. A provision requiring the *fac simile* of the signature of the town clerk or other officer who prepares the ballots is to prevent the fraudulent casting of spurious or illegal ballots. That provision is mandatory, and ballots which do not contain such *fac simile* are illegal ballots.

It follows that at the election in question there were no legal ballots cast. Such election was therefore illegal and the tax levy in question herein was unauthorized and void. This being true, the consideration of other assignments of error becomes unnecessary, as the judgment of the county court must for this reason be affirmed.

Judgment affirmed.

(No. 12297.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOSEPH M. MOSES, Plaintiff in Error.

Opinion filed June 18, 1919.

1. CRIMINAL LAW—*when a conviction for conspiracy to obtain property by false pretenses is authorized.* A conviction for conspiracy to obtain a check by false pretenses is authorized even though there were also threats and intimidation by the defendants, where such threats and intimidation would have been ineffectual had it not been for the false pretenses made by the defendants with respect to their authority to represent a branch of State government.

2. SAME—*giving numerous instructions on reasonable doubt will not, alone, cause reversal of judgment.* The giving of numerous instructions in defining the term "reasonable doubt" is not proper, because the words define themselves, but the giving of such instructions will not be regarded as so prejudicial as to alone warrant the reversal of a judgment.

3. SAME—*errors not presented to Appellate Court are waived.* The Supreme Court reviews the judgment of the Appellate Court, and alleged errors not presented to that court are waived and can not be raised in the Supreme Court for the first time.

4. SAME—*unit of time in law is one day.* The unit of time in law is one day, unless there are hostile claims requiring a division of the unit for the purpose of settling relative rights.

5. SAME—*Parole act of 1917 does not apply to crime of conspiracy.* As the minimum term of imprisonment for the crime of conspiracy, under the Criminal Code, must be taken as one day, the provisions of the Parole act of 1917 for an indeterminate sentence and for parole after one year of imprisonment cannot apply to the crime of conspiracy, and the court may sentence one convicted of that crime to a definite term of imprisonment not exceeding five years.

6. SAME—*when prisoner is eligible to parole under Parole act of 1917.* Before a prisoner sentenced under a general or indeterminate sentence is eligible to parole under the Parole act of 1917 he must have been imprisoned for at least a year and must have served the minimum term of imprisonment provided by law for the crime of which he has been convicted.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Hancock county; the Hon. HARRY M. WAGONER, Judge, presiding.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON, (EDWARD R. JOHNSTON, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, EARL W. WOOD, State's Attorney, and EDWARD C. FITCH, (CLIFTON J. O'HARA, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Joseph M. Moses and Arthur Wilson were charged in an indictment in the circuit court of Hancock county with conspiracy to obtain from Mary G. Carr property or money of the value of \$75 by means of false pretenses. They were found guilty and by the verdict punishment was fixed at confinement in the penitentiary for a term of eighteen months. They were sentenced in accordance with the verdict, and Joseph M. Moses, plaintiff in error, sued out a writ of error from the Appellate Court for the Third District, where the judgment was affirmed, and he prosecuted a writ of error from this court to review the judgment of the Appellate Court.

In April, 1917, Joseph M. Moses, plaintiff in error, and Arthur Wilson formed a partnership to travel from place to place under the firm name of J. M. Moses & Co., specialists to treat and cure diseases, and divide the money obtained from the business equally. Moses was a graduate of the College of Physicians and Surgeons of Chicago and had traveled through the country districts of Illinois and Missouri since 1897 practicing as a specialist for diseases of the eye, ear, nose and throat. Wilson was an optician, who had traveled, doing work in that line, for fourteen years. Wilson solicited the business and did some optical work, and Moses made free examinations and treated such persons as could be induced to accept and pay for services. About the last of May, 1917, Moses and Wilson established Quincy as their headquarters and made daily trips through

the country in the prosecution of their business. On June 21, 1917, they left Loraine in the morning in a hired automobile and stopped at various places soliciting persons to be treated. About 10:30 o'clock in the forenoon they came to the home of Mary G. Carr, two miles west of the village of Stillwell, and were told by the driver that she was a widow and owned the farm. Wilson went into the house and handed to Mrs. Carr a card having on it the firm name, above which were the words, "Illinois State License—Missouri State License," and below were the words, "Chicago, Ill., St. Louis, Mo.," and asked her if her people were well. Mrs. Carr said that her daughter, Iva, had hay fever and asthma but was not at home and would be back in the afternoon about 2:30 o'clock. Wilson asked if there was any consumption in the family, and Mrs. Carr said there was on her husband's side. Moses and Wilson returned about 2:30 in the afternoon, when the daughter, Iva, was at home, but she refused to be examined. After much persuasion she consented, and Moses examined her while seated in a chair and also in bed. The only disputed question of fact was as to what occurred in the house at that time after the examination. Mrs. Carr and her daughter testified that Moses told them Iva was in the first stages of consumption; that she had a spot on her left lung as large as a half dollar and if she did not take their treatment she would be dead in a year and a half; that they had authority from the State Board of Health that if she did not take their treatment to place her in the Dwight sanitarium just like an insane person, and unless she accepted their treatment they would be obliged to place her in a sanitarium within twenty-four hours; that they would take her to the Dwight sanitarium and keep her there for a year, and she would see no one and no one would see her, and the State would pay for it if Mrs. Carr was not able but if she was able she would have to pay for it; that Iva refused to take the treatment, and Moses said, "All right my little lady, we don't

have to fool with you; we will send your name to the State Board of Health;" that she again refused, and he said, "You be ready in the next twenty-four hours and we will be after you;" that she said, "You can't take me," and he said, "We will have someone along with us and I guess you will go." Moses testified that he found catarrhal conditions of the nose and throat, known as incipient consumption; that it was a condition where the germ was there and when the germ hits it consumption will develop, and that incipient consumption means a germ disease lying there ready to be set afire by conditions which are predisposing. He said that he explained to Mrs. Carr and Iva that the upper part of one lung was slightly affected. Wilson testified that Moses pointed out the conditions of the lungs which might lead to consumption,—a dormant condition which might at any time develop into tuberculosis if a heavy cold settled on the lungs. Both defendants denied any statement about authority from the State Board of Health, or that anything was said about a sanitarium at Dwight, or that threats of any kind were made to take the daughter forcibly or against her will to any sanitarium. Again, there was no dispute as to the following facts: Mrs. Carr and the daughter refused to take the treatment and Moses and Wilson went out to the automobile. The daughter then consented to take the treatment and Mrs. Carr went to the door and called Wilson. Moses told Wilson that the old lady was up and stirring around and coming out of the house, and Wilson told the driver to make a stall and get a bucket of water, which was done. It was then agreed that the cost of the treatment should be \$150,—\$75 cash and \$75 at the end of one year,—and if the daughter was not cured at the end of one year the defendants would continue to treat her for nothing. Mrs. Carr then gave her check for \$75 on a bank at Stillwell, and Moses gave her a bottle of liquid, two boxes of pills and an atomizer. Moses and Wilson then drove direct to the bank at Stillwell, where the check was cashed.

There was no tuberculosis sanitarium at Dwight, and neither Moses nor Wilson had any authority to represent the State Board of Health. Neither that board nor the department of public health has ever exercised any authority over tuberculosis and Iva Carr was not suffering from tuberculosis when she was examined. The jury were fully justified in finding that the check was obtained by false pretenses of the plaintiff in error which Mary G. Carr believed to be true.

The argument that the check was obtained by threats and intimidation and therefore a conspiracy to obtain money by false pretenses was not established, is not founded in fact and affords no ground for reversing the judgment. It is true there were threats, but they would have been wholly ineffective but for the false representations of authority from the State Board of Health to represent that board as specialists in the treatment of disease and the knowingly false representation that the daughter had tuberculosis. If Mary G. Carr had known that her daughter did not have tuberculosis and that the State Board of Health had never assumed any jurisdiction of tuberculosis or authorized the plaintiff in error and Wilson to represent the State board she would not have cared for their threats or given up her check.

It was assigned for error in the Appellate Court, and is again assigned in this court, that the circuit court erred in giving instructions to the jury. The objections made are of little importance and the series of instructions fully and fairly presented the law. The principal complaint is that the court gave several instructions on the subject of reasonable doubt, informing the jury that a reasonable doubt must be reasonable and not unreasonable nor a variety of other things not within the meaning of the word "reasonable." The giving of such instructions has been criticised, both as unnecessary and because there is no better definition of the meaning of the words "reasonable doubt" than the words themselves, (*People v. Harrison*, 261 Ill. 517;

People v. Parker, 284 id. 272;) but they have not been regarded as so prejudicial as to alone warrant the reversal of a judgment. In *Bean v. People*, 124 Ill. 576, an instruction, characterized as a treatise on reasonable doubt, containing seven specifications of what is and what is not a reasonable doubt, was given to the jury, and the court said that in order to a full understanding by the jury of the import of the term somewhat of amplification might be excusable. The judgment would not be reversed on account merely of these instructions, and it appears from a certified copy of the brief and argument of the plaintiff in error in the Appellate Court that no objection was made or argued concerning the giving of any instruction here complained of. This court reviews the judgment of the Appellate Court, and alleged errors not presented to that court are waived and abandoned and cannot be raised in this court for the first time. *Dunn v. Crichfield*, 214 Ill. 292; *People v. Seymour*, 272 id. 295; *People v. Donahoe*, 279 id. 411.

It is argued that the court erred in directing the jury, if they found the plaintiff in error guilty, to fix the punishment, and that the verdict and sentence were contrary to law because the Parole law of 1917 required an indeterminate sentence. That Parole law is entitled "An act to revise the law in relation to the sentence and commitment of persons convicted of crime or offenses and providing for a system of parole and to repeal certain acts and parts of acts therein named." (Laws of 1917, p. 353.) Section 1 of the act provides that the jury shall fix the punishment for the offenses of misprision of treason, murder, rape or kidnaping, and section 2 provides that except for crimes enumerated in section 1 every sentence to the penitentiary shall be a general sentence of imprisonment and the court imposing the sentence shall not fix the limit or duration of the imprisonment. The punishment fixed by the Criminal Code for the crime of conspiracy is imprisonment in the penitentiary for not more than five years or a fine not ex-

ceeding \$2000, or both. The unit of time in the law is one day, unless there are hostile claims requiring a division of the unit for the purpose of settling relative rights. (*Grosvenor v. Magill & Latham*, 37 Ill. 239; *Levy v. Chicago Nat. Bank*, 158 id. 88.) The punishment prescribed by the Criminal Code is therefore imprisonment for a minimum time of one day and a maximum of five years. While the general language of sections 1 and 2 might be regarded as applying to all crimes, section 7 provides that no person sentenced under a general or indeterminate sentence shall be eligible to parole earlier than one year after commitment, nor until he or she shall have served the minimum term of imprisonment provided by law for the crime or offense for which he or she was sentenced. The general provisions of sections 1 and 2 therefore cannot apply to the crime of conspiracy unless the Parole law amended the Criminal Code by increasing the minimum term of imprisonment to one year or one convicted of that crime is eligible to parole the next day after his commitment. The first proposition is not within the purpose or any provision of the Parole law and if adopted would render it unconstitutional, and the second is contrary to the plainly expressed legislative intent.

In *Featherstone v. People*, 194 Ill. 325, the court said that the Parole law then in force was not intended to fix the punishment for crime but from its provisions clearly implied that the General Assembly had already defined crimes and fixed their punishment, and that parole laws do not fix punishment but direct the manner of imposing sentence by the court. In *People v. Hartsig*, 249 Ill. 348, Emory Hartsig was convicted of the crime of conspiracy and was sentenced under the Parole law. The judgment was reversed, and it was decided that the Parole law did not apply to the crime because it fixed a term of imprisonment of not less than one year. It was also decided that the subject of fixing punishments for crime was not within the scope of the title of the act then in force, which was the same as

the title of the present act, and a provision therein changing the punishment for conspiracy to a term of not less than one year nor more than five years would be void under section 13 of article 4 of the constitution. As applied to this case it would also be *ex post facto*, since the crime was committed on June 21, 1917, before the act took effect.

One sentenced to the penitentiary under a general or indeterminate sentence cannot be released on parole until he has been confined in the penitentiary at least one year nor until he shall have served the minimum term of imprisonment provided by law for that crime. The two conditions must concur. One year of imprisonment must have been served in any case, and if the minimum term of imprisonment provided by law for the crime exceeds one year the imprisonment must be for such minimum term. If the General Assembly had intended that a prisoner committed under a general or indeterminate sentence should be eligible to parole when he had served the minimum term of imprisonment prescribed by law for the crime of which he was convicted, a provision to that effect would have covered the entire subject and there would have been no necessity for fixing the period of one year. The plain meaning of the Parole law is that the imprisonment shall be for at least a year, and if the minimum term fixed by law is more than a year the prisoner must serve that length of time before being eligible to parole. The Parole law of 1917 has not changed the term of imprisonment fixed by the Criminal Code for the crime of conspiracy.

The court did not err in directing the jury to fix the punishment of the plaintiff in error nor in sentencing him to confinement in the penitentiary for a definite term of eighteen months, and the judgment is affirmed.

Judgment affirmed.

(No. 12684.—Decree affirmed.)

THE AMERICAN CAN COMPANY, Appellant, vs. LOUIS L. EMMERSON, Secretary of State, Appellee.

Opinion filed June 18, 1919.

1. CORPORATIONS—*section 5b of Foreign Corporations act, as amended in 1917, does not impair the obligation of contracts.* Section 5b of the Foreign Corporations act, as amended in 1917, providing the method by which the proportion of the capital stock of foreign corporations represented by their property and business in Illinois shall be estimated and for assessment of additional fees thereunder, does not impair the obligation of contracts made by the issuance of licenses to such corporations under the act of 1897, as amended in 1899.

2. SAME—*section 5b of the Foreign Corporations act does not discriminate against foreign corporations.* Section 5b of the Foreign Corporations act, as amended in 1917, merely provides a just method of estimating the proportion of the capital stock of foreign corporations represented by their property and business in Illinois and does not discriminate against such corporations in favor of domestic corporations of like character.

3. SAME—*when tax on a foreign corporation does not impose burden on inter-State commerce.* While the State may not regulate inter-State commerce nor impose burdens thereon it is authorized to levy a tax within its authority, measured by the capital stock of a foreign corporation in part used in the conduct of such commerce; and where the circumstances are such as to indicate no purpose or necessary effect to burden such commerce, it may require a license fee based upon the proportion of capital stock represented by the property and business of such corporation in the State.

4. SAME—*words "capital stock" in the Foreign Corporations act mean stock authorized by charter.* The words "capital stock," in section 5b of the Foreign Corporations act, as amended in 1917, providing a method of estimating the proportion of the capital stock of foreign corporations represented by their property and business in Illinois, mean the capital stock authorized by charter and not the stock actually issued.

APPEAL from the Circuit Court of Sangamon county;
the Hon. E. S. SMITH, Judge, presiding.

TENNEY, HARDING & SHERMAN, (HORACE KENT TENNEY, and HARRY A. PARKIN, of counsel,) for appellant.

EDWARD J. BRUNDAGE, Attorney General, CLARENCE N. BOORD, and JAMES W. GULLETT, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause is brought to this court on appeal from a decree of the circuit court of Sangamon county sustaining the demurrer of the appellee to the bill of complaint of the appellant and dismissing the bill for want of equity. By the bill of complaint the appellant seeks to restrain the Secretary of State of Illinois from paying over to the State Treasurer the license fee collected from the appellant by the Secretary of State under the amendment to the Corporation act approved June 22, 1917. Upon demand by the Secretary of State the appellant, under protest, paid the fees under said act as amended in the amount demanded. A stipulation was entered into that the money should be retained by the Secretary of State pending the determination of this cause, and a temporary injunction was ordered by the court continued pending this appeal.

The appellant is a foreign corporation organized under the laws of New Jersey. On July 8, 1901, it filed an application on the form provided by the Secretary of State for a license as a foreign corporation to do business in the State of Illinois and fully complied with the statute then in force and with the requirements of the Secretary of State. A license was issued to the appellant under the provisions of the act of May 26, 1897, as amended by the act of April 22, 1899, entitled "An act to amend an act entitled 'An act to require every foreign corporation doing business in this State to have a public office or place in this State at which to transact its business, subjecting it to a certain condition, and requiring it to file its articles or charter of

incorporation with the Secretary of State, and to pay certain taxes and fees thereon.'” (Laws of 1899, p. 118.) Section 3 of said acts reads in part as follows:

“Such corporation, by its president, secretary or any officer thereof, shall make and forward to the Secretary of State, with the articles or certificate above provided for, a statement duly sworn to of the proportion of capital stock of the said corporation which is represented in the State of Illinois by its property located and business transacted therein and such statement shall further show the name and address of the agent or representative of said corporation in this State; and such corporation shall be required to pay into the office of the Secretary of this State, upon the proportion of its capital stock represented by its property and business in Illinois, fees equal to those required of similar corporations formed within and under the laws of this State. Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this State, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Illinois; and such certificates shall be taken by all courts in this State as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this State, in which event the time and duration shall be the limit of time set out in the laws of this State. Such corporations having complied, as aforesaid, shall be required to promptly report to the Secretary of State any change in the name and address of its agent or representative in this State, and any increase or decrease in its capital stock, and any increase or decrease of the proportion of its capital stock represented in this State by its property and

business therein, by filing in the office of the Secretary of State a statement properly sworn to setting forth the facts."

The application thus filed with the Secretary of State set forth the authorized capital stock at \$88,000,000, and the proportion of the stock represented by the property located in and the business transacted in Illinois at the time the application was placed, at \$1,000,000. The fee was based upon one-eighty-eighth of its authorized capital stock and was fixed at \$1045, which was paid by the applicant and a license issued to it under the seal of the State of Illinois, setting forth that appellant had filed a copy of its charter and had in all respects complied with the law governing foreign corporations, and that "said American Can Company is from the date hereof duly authorized to do business in the State of Illinois for a term of ninety-nine years and is entitled to all the rights and privileges granted to foreign corporations under the laws of this State; that the amount of capital stock of said corporation is \$88,000,000 and the amount of capital stock represented in the State of Illinois is \$1,000,000." Thereupon the appellant began transacting business in the State of Illinois and has been carrying on a large volume of intra-State and inter-State business, invested large sums in factories having an appraised value of several million dollars, including real estate, plants, machinery, etc., and employed a large number of persons in its business. In March, 1918, the Secretary of State submitted to appellant interrogatories under the amendment of June 22, 1917, to which appellant filed answers showing in detail the total value of all its property, both real and personal; the assessed and appraised value of its tangible property in Illinois; the total amount of its entire business for the preceding year, both in and out of Illinois; the location of its principal places of business in the different States; its authorized capital stock to be \$88,000,000, of which \$82,466,600 had been issued; the estimated annual business transacted by appellant at and

from places of business in Illinois, including sales to residents of Illinois, to be \$19,536,930.37, and the amount of sales made to residents of Illinois to be \$10,029,000. On receipt of these answers submitted by appellant the Secretary of State wrote to appellant as follows: "From the answer to the interrogatories it would appear that .09745 of the tangible property and business of the corporation is represented in Illinois. This will require the corporation to pay upon \$8,576,000 of the capital stock, or a fee of \$8621. Allowing a credit of \$1045, (the fee paid heretofore,) there is a balance of \$7576 due the State, which you will please remit in accordance with section 5c of the Foreign Corporation act." The only change in the situation of appellant since the license was issued is in the amount of its property and business in the State of Illinois upon which it has paid to the State the taxes regularly assessed.

It is contended by the appellant that the license issued to do business in this State under the Corporation act in force at the time is a contract between the State and appellant, which cannot be changed or modified to require appellant to make further payments unless by a general law similar payments are required of domestic corporations under the same circumstances; that the amendment of 1917 impaired the obligations of this contract and imposed a tax, which amounted to an interference with inter-State commerce, denied appellant the equal protection of the laws and took its property without due process of law, and that the act of 1917 is void under the State and Federal constitutions; that the fee should be based upon the capital stock actually issued and not upon the authorized capital stock; that the amendment of 1917 creates a different basis for the license fee than was fixed by the statute at the time the license was issued.

It is contended by the appellee that the words "capital stock" in the Foreign Corporation act at the time the license was issued to appellant, as well as in the amendment

of 1917, mean the authorized capital stock fixed by the charter and not the capital stock actually issued at the time the license was granted; that foreign corporations are subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State and that said tax is not a discrimination; that the charging of additional fees in case of change in the capital stock represented in this State was permitted under the law in force at the time the license was issued to appellant; that the amendment of 1917 is not a new basis upon which the fees shall be based but is a method or rule whereby to compute and determine the capital stock represented.

Section 5b, as amended in 1917, is the section of the act complained of. That section made it the duty of the Secretary of State from time to time to ascertain by interrogatories propounded to foreign corporations doing business in this State, "the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State. If no tangible property is used in the business of the corporation, the proportion of capital stock represented shall be determined with reference only to the percentage of the total business of the corporation transacted in Illinois." (Laws of 1917, p. 306.)

It is admitted by appellee that the license granted to appellant in 1901 is a contract, and that if the amendment of 1917 were to be held to violate said contract such amendment would be unconstitutional as an impairment of the obligations of a contract, but it is insisted that the act is not open to this objection. In support of the contention of the appellant that this amendment violates its contract as evidenced by the license issued in 1901, it is urged that the

original license fixed the amount of the fee on the basis of facts existing at that time for ninety-nine years and recited that a full compliance had been made with the statute; that when this fee was paid it represented the entire fee required or to be required of appellant.

An examination of the laws in effect at the time this license was given discloses the following: Section 26 of the Corporation act of 1872 provided as follows: "Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." This section was in force July 9, 1901, and is still in force. The fees required of all corporations organized under the laws of this State were fixed by the act of 1895. (Hurd's Stat. 1917, par. 10a, p. 1504.) That act was in force July 1, 1901, and is still in force. Section 26 of the act of 1872, as herein quoted, is re-enacted in section 1 of the act of 1897 as amended in 1899, under which appellant's license was issued.

It will be seen that these several acts upon which the contract of appellant was based provided that foreign corporations shall be subjected to all liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State. This act was a part of the contract of appellant. The law also provided, as we have seen, that a foreign corporation which has complied with section 2 of the act of 1899, and to which a license has been issued, shall be required to report to the Secretary of State, on inquiry, among other things, any increase or decrease in its capital stock and any increase or decrease of the proportion of its capital stock represented in this State by its property and business therein. This provision was also a part of the contract of appellant when the license was issued. It is and

has been an underlying principle in the policy of this State in its treatment of foreign corporations that they shall be subjected to the same rights and liabilities as domestic corporations of like character. This provision has been enacted in practically every corporation law since 1872, and the inquiry here is whether or not this contract, based, as it is, upon this provision of the statutes, is being violated by this act. If treatment is thereby accorded appellant not accorded domestic corporations then the act is void, as by section 26 foreign corporations are not to be subjected to greater liabilities or restrictions than domestic corporations under like circumstances. On the other hand, if they are accorded such treatment the act is not invalid for the reasons urged. *Stevens v. Pratt*, 101 Ill. 206; *Granite State Provident Ass'n v. Lloyd*, 145 id. 620.

It is urged that this payment at this time is an additional payment for a vested right such as is not required of domestic corporations, and in support of this contention *American Smelting and Refining Co. v. Colorado*, 204 U. S. 103, is cited. In that case the American Smelting and Refining Company had paid a fee based upon its entire capital stock at the time of its admission to the State. Thereafter the legislature passed a law levying an annual license tax of two cents on each \$1000 of the capital stock of domestic corporations and four cents on each \$1000 of the capital stock of foreign corporations. Colorado had on its statute books at that time an act in substance identical with section 26 of the act of 1872 herein referred to. The United States Supreme Court in that case held, in view of the fact that the American Smelting and Refining Company had paid all fees assessed by that State against domestic corporations, that the new law was in violation of the contract of that State with said company based upon the statute making foreign corporations subject only to the same restrictions, liabilities and duties imposed upon domestic corporations, and was therefore void. That case is to be

distinguished from the case at bar in this: that there the foreign corporation had paid a fee based upon its entire capital stock, while here the fee paid by appellant was based upon one-eighty-eighth of its entire capital stock. Therefore, instead of being discriminated against by the payment of this further fee, it is apparent that appellant has not yet paid the amount of fee which a domestic corporation of like character, with like capital stock, must pay before it is allowed to do business. While the license granted to appellant was a vested right it was vested subject to the terms of the contract, and the laws in existence in this State at the time of the issuance of the certificate of license must be incorporated therein. We have seen that its contract, as represented by the law, provided that it should report on interrogatories, from time to time, touching the proportion of its stock represented here by its property and business; also that it was to be subjected to the same liabilities that domestic corporations are subjected to. The only purpose which the legislature could have had in requiring further reports on increase or decrease of the proportion of the capital stock represented by the business and assets of foreign corporations within the State was that such reports might form a basis for according to such foreign corporations the same treatment accorded to domestic corporations in regard to fees to be paid. It follows that while the license to do business is a vested right, it is not a right for which appellant paid in full at the time the license was issued. It can hardly be urged as consonant with the policy of this State of equal treatment of foreign and domestic corporations, that a foreign corporation with a large capital stock but with little or no business or property in this State might gain a license to do business here on a minimum fee and thereafter transfer the bulk of its property and business to the State without paying any further fee, while a domestic corporation of like character and like capital stock is required to pay the fee on its entire capi-

tal stock before it is allowed to do business. It was the evident intention of the legislature by requiring these reports and these additional fees, to conform to the policy of this State of equal treatment of foreign corporations and domestic corporations, and instead of being a discrimination against a foreign corporation it is but a just method of equalizing, as far as it may be equalized, the liabilities of the foreign corporation and those of the domestic.

In the case of *Tarr v. Western Loan and Savings Co.* 15 Idaho, 741, this same question was raised. It was there urged that as the foreign corporation in that case had complied with the statute in force at the time the license to do business was issued, it was not within the power of the legislature to add additional requirements with which it must comply in order to continue doing business. In that State the statute likewise provided that foreign corporations should have all the rights and privileges of like domestic corporations. It was held that since the act there in question required a foreign corporation to pay to the Secretary of State the same fees as are required to be paid by like domestic corporations, the exactions made of foreign corporations were not different from those made of domestic corporations, and that there was no discrimination and no impairment of contract obligations.

It is contended by appellant, however, that the amendment of 1917 makes a new basis for computing fees, for the reason that it based the fees on an average of the percentage of Illinois assets to total assets and of its Illinois business to total business, and that an average of two figures must necessarily be different from either. The general law gives no method for the computation of the proportion of capital stock represented in the State. What method was adopted by the Secretary of State is not material, as such would not be binding on the legislature. Whether or not the legislature by the amendment of 1917 changed the basis of computing the fees depends on whether the

method therein prescribed might legally have been used by the Secretary of State under the law as it existed in 1901, when the license was issued to the appellant. We are of the opinion that the law in effect at the time the license was issued herein would have permitted the use by the Secretary of State of the method, in arriving at the same matter, which is prescribed in the amendment of 1917. That which is to be sought as the basis of the fees in this case is the proportion of the capital stock represented in this State by the property and business of the corporation within the State. Previous to the amendment of 1917 the statute was silent as to the method of computing such proportion. The amendment provides that the Secretary of State shall, from interrogatories and answers thereto, ascertain "the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State." It is not pointed out wherein this method would work an injury to appellant over any method used in the past. In fact, a computation based upon this method appears, on demonstration, to be more favorable to appellant than that based on the method previously used by the Secretary of State. However, that is not the test. The test is whether the present method could have been used previous to the amendment of 1917. We are of the opinion that it could. In any event, the object was to ascertain the proportion of the capital stock represented in this State by business and property. It was upon that proportion that the fee was and is based.

It is urged that this is a discrimination against foreign corporations, for the reason that an increase of Illinois business and a decrease of the business outside of the State each result in an increase of the fees. While this is true it does not argue that such a basis is therefore illegal. Those

are circumstances which affect the amount of the fee required to be paid but do not, however, affect the rule, which is, that a fee shall be paid in proportion to the amount of stock represented in the State. Any method of computing the proportion of representation of stock in the State would be open to the same argument. Nor does this work a discrimination against a foreign corporation in favor of a domestic corporation of a like character, for the reason that in no event could the foreign corporation be required to pay more fees than the domestic corporation pays, even though such foreign corporation transfers all its business and all its property to this State, as it would then be paying no more fees than the domestic corporation, which must pay the same fees on its entire capital stock before it commences business.

It is also urged that the amendment of 1917 is invalid as contravening the Federal constitution, in that it denies appellant the equal protection of the laws and seeks to take its property without due process of law. As we have seen, this act does not result in discrimination against foreign corporations, and therefore it follows that appellant is not being denied the equal protection of the laws. An examination of the authorities cited by counsel discloses that in each case the effect of the statutes there in question was to put upon foreign corporations a greater burden than upon domestic corporations of like character.

It is also urged by appellant that the tax here in question is an unlawful interference with inter-State commerce, on the ground that the tax assessed is measured by the percentage of its authorized capital stock, and that the tax imposed is a tax upon not only its capital, property and business represented in Illinois, but likewise its capital, property and business in other States. It will be seen that the amount of this fee or tax required to be paid by appellant is measured, as provided by the act, by a percentage of that proportion of its entire capital stock which is repre-

sented in the State by its property and business within the State. Such fee is not computed upon the entire capital stock but upon a fraction of that stock, and that fraction such as is represented within this State. It is evident that the only circumstances under which the legislature intended that a foreign corporation should be taxed upon all of its capital stock would be where it had transferred all its business and property to this State. If, from the mere fact that this license fee or tax must be paid out of the earnings of the company, it should be held that it was therefore a tax upon the whole capital stock of the corporation, then it would be impossible to levy any fee on a foreign corporation for privilege to do business in this State, as any such fee or tax, because paid out of the earnings of the corporation, would be a burden upon inter-State commerce. Such is not the law. The right of States to levy such fee has been universally recognized.

In support of their contention that this amendment places a burden upon inter-State commerce counsel for appellant cite numerous cases, which will be found, upon examination, to differ from the facts in this case, and none of which hold, as we understand them, that a license fee required of a foreign corporation to do business in a State is a burden upon inter-State commerce. The most recent case cited by the appellant is that of *Union Pacific Railway Co. v. Public Utilities Com. of Missouri*, 248 U. S. 67. The State of Missouri passed a law fixing a tax by a percentage upon the total issue of bonds contemplated by said railroad company. The railroad company was a foreign corporation having over 3500 miles of railway, of which about six-tenths of one mile of main track was in the State of Missouri. It had a total property in the State of Missouri of a little over \$3,000,000 out of a total average of \$281,000,000. The business done by the road in Missouri was wholly inter-State. The court there says: "On these facts it is plain on principle now established, that the charge

which, in accordance with the letter of the Missouri statutes, was fixed by a percentage on the total issue contemplated, was an unlawful interference with commerce among the States." In the case at bar there is no attempt to fix taxes on the entire capital stock of appellant. All that is sought is that appellant shall pay, as a license fee to do business, the same fee on the proportion of its stock represented in this State that would be paid by a domestic corporation of like character on the same amount of stock. Such has been held valid by the Supreme Court of the United States. In *United States Express Co. v. Minnesota*; 223 U. S. 335, it was held that while a State does not have the right to burden inter-State commerce by taxing it, yet such inter-State commerce may be used as a measure of the value of the property of a corporation engaged in inter-State commerce. The court in that case says: "In *Maine v. Grand Trunk Railway Co.* 142 U. S. 217, this court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchise therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, State and inter-State. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation and thus measuring the tax, which was held to be within the power of the State. In *Wisconsin and Michigan Railway Co. v. Powers*, 191 U. S. 379, a tax was sustained which made the income of the railway company within the State, including inter-State earnings, the *prima facie* measure of the value of the property within the State for the purpose of taxation. In the course of the opinion this court said (p. 387): 'In form the tax is a tax on the property and business of such railroad corporation operated within the State, computed upon certain percentages of gross income.

The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk Railway Co.* 142 U. S. 217.' "

The rule adopted by the United States Supreme Court is, that while the State may not regulate inter-State commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. *Kansas City Railroad Co. v. Stiles*, 242 U. S. 111; *Northwestern Mutual Co. v. Wisconsin*, 247 id. 132; *United States Glue Co. v. Oak Creek*, 247 id. 341; *Baldwin Tool Works v. Blue*, 240 Fed. Rep. 202.

Appellant also urges that the act is invalid in that the fee there required is based upon the entire capital stock of the company, including the unissued as well as the issued capital stock. The statute refers to the proportion of the capital stock of the corporation. Section 3 of the Corporation act, as amended in 1899, required a statement of "the proportion of the capital stock" represented in this State, and required the payment of the license tax thereon. This same provision appears in the amendment of 1917. As we have seen, this license tax is not a burden upon inter-State commerce and is not a tax on the entire capital stock of the corporation but only upon that portion represented within this State. The whole of the capital stock is used merely as a method of determining what proportion of the same is so represented. Again, domestic corporations are required to pay a tax or fee upon the authorized capital stock, regardless of the amount issued. Under the policy of equal treatment, therefore, it is evident that the legislature intended that the capital stock to be considered in arriving at the proportion upon which the license tax is to be based is the capital stock authorized by the charter. The term "capital stock" has been defined as a term

used to indicate the amount of capital stock which the charter provides for. (*State v. Fire Ass'n*, 23 N. J. L. 195.) While, for purposes of levying an *ad valorem* tax, the term has in some States been defined to mean the amount of capital paid in, we are of the opinion that for the purposes for which used here the term "capital stock" refers to the capital stock authorized.

We are therefore of the opinion that the amendment of 1917 is not open to the objections urged against it.

The decree of the circuit court sustaining the demurrer and dismissing appellant's bill for want of equity will therefore be affirmed.

Decree affirmed.

(No. 12632.—Judgment affirmed.)

THE PEOPLE *ex rel.* Samuel P. Thrasher, Appellant, *vs.*
JACOB M. EISENBERG, Appellee.

Opinion filed June 18, 1919.

1. APPEALS AND ERRORS—*when Supreme Court cannot review question whether an injunction was properly dissolved.* As the Supreme Court is without jurisdiction to review by writ of *certiorari* a judgment of the Appellate Court directing the dissolution of a temporary injunction, it cannot review such judgment on a subsequent appeal from the judgment of the circuit court assessing damages upon dissolving the injunction in accordance with the mandate of the Appellate Court.

2. INJUNCTION—*damages may be assessed upon dissolution of temporary injunction to abate nuisance.* Where a temporary injunction issued on a bill to abate a nuisance is dissolved, the circuit court, under section 12 of the Injunction act, has authority to hear evidence in support of a suggestion of damages and to assess damages without disposing of the merits of the bill.

THOMPSON, J., dissenting.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

SIMS, WELCH & GODMAN, for appellant.

BRADY, RUTLEDGE & DEVANEY, (JAMES A. BRADY, of counsel,) for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

The appellant on August 19, 1916, filed a petition and bill in equity in the circuit court of Cook county to secure an injunction against appellee restraining him from permitting certain property owned by him and located in the city of Chicago to be used for purposes of lewdness, assignation and prostitution, in violation of the statute on nuisances. (Hurd's Stat. 1917, p. 2022.) Prior to the filing of the bill and petition the relator by mail notified the defendant, Eisenberg, that the premises were being used in violation of said act. On August 3, 1916, a written notice was personally served on Eisenberg, notifying him that on June 21 and July 28, and on divers days between said dates and prior thereto, the premises in question had been used contrary to and in violation of said act. This notice called particular attention to section 2 of said act, which provides that no proceedings shall be instituted to abate the nuisance until five days after service of said notice. It also informed Eisenberg that if he did not abate the nuisance within a reasonable time after the expiration of five days, proceedings would be taken in a court of equity to abate the nuisance. After the expiration of the five days set out in said notice the petition and bill in question were filed in the circuit court of Cook county and a temporary injunction was issued without the previous notice provided for in section 3 of the Injunction act. (Hurd's Stat. 1917, p. 1659.) The bill and the petition each set forth the facts aforesaid and pray for the issuing of an injunction writ and were each verified by the affidavit of the relator. Thereupon, and without any appearance or proceedings of any kind in the circuit court, an appeal was perfected from the

interlocutory order to the Appellate Court for the First District. Upon hearing in said court it was held that the allegations of the bill were not sufficient to authorize the court to issue the temporary injunction without notice. It was held by said court that because of the failure to give notice of the time and place of the application for the injunction, as required by section 3 of the Injunction act, the interlocutory order was wrongfully issued. The Appellate Court reversed the judgment and remanded the cause for a further hearing upon the issues set out in the bill. The remanding order of the Appellate Court was duly entered by the circuit court, after which the preliminary injunction was dissolved in accordance with the rulings of the Appellate Court. Thereupon the defendant, Eisenberg, filed his suggestion of damages sustained for solicitor's fees in securing the dissolution of the temporary injunction. After a hearing the circuit court entered a decree and judgment against the relator for the sum of \$500 found by it to be the fair and reasonable value of the services of the defendant's attorney in securing such dissolution. This judgment was awarded by the circuit court in advance of any consideration of the merits of the cause as set forth in the petition and bill. From this judgment an appeal was perfected to the Appellate Court and was by said court affirmed. The cause comes to this court upon a certificate of importance issued by the Appellate Court.

It is contended by the appellant that a judgment for damages in securing the dissolution of a temporary injunction without passing upon the issues set forth in the bill is without authority of law; that the preliminary injunction was wrongfully dissolved for the reason that the notice required by section 3 of the Injunction act does not apply to proceedings under the Nuisance act; that the petition and bill of complaint of appellant made out a case in equity sufficient for an order granting a temporary injunction without notice, and therefore the assessment of damages was

illegal; that the failure to give notice under the Injunction act, which would, at most, constitute a mere irregularity, did not justify an assessment of damages for attorney's fees, only, without evidence of other damages suffered; that upon the filing of a verified petition, if the court is satisfied that the nuisance complained of exists, the court shall allow a temporary writ of injunction with bond (unless the petition is filed by the State's attorney) in such amount as the court may determine, provided no such injunction is issued except on behalf of an owner or agent, unless the court is satisfied that such owner or agent had been personally served with a notice signed by the petitioner five days prior to the filing of said petition; and that this provision of the statute on nuisances makes the notice provided for by section 3 of the Injunction act useless and inoperative.

It is contended on the part of appellee that the judgment of the Appellate Court on the former appeal of this case reversing and setting aside the order of the circuit court granting the injunction herein and holding that the injunction had been wrongfully issued on the ground that no notice was given as required by section 3 of the Injunction act was not reviewable, and that appellant is therefore precluded from further review of such decision, and that it must be assumed that the injunction was wrongfully issued.

A petition for *certiorari* was filed in this court from the decision of the Appellate Court and was dismissed on the ground of want of jurisdiction of this court to review a decision of the Appellate Court touching the disposition of an interlocutory injunction. The judgment herein is for damages assessed by the circuit court of Cook county upon the dissolution of the temporary injunction in accordance with the mandate of the Appellate Court.

The Appellate Court has affirmed the judgment of the circuit court and granted a certificate of importance in this case, and the first question presented here is whether or

not this court can take jurisdiction to determine the legality of the mandate of the Appellate Court dissolving the temporary injunction, on which mandate the damages are based, when this court is without jurisdiction to review such order of dissolution by writ of *certiorari*. To hold that this court has such jurisdiction would be to indirectly confer a jurisdiction which cannot be assumed directly. The result arising from such a holding would, in effect, confer upon this court jurisdiction to review the decision of the Appellate Court in all cases of the dissolution of interlocutory injunctions where damages had been assessed. We are of the opinion, therefore, that this court is precluded from reviewing the question whether or not the injunction was properly dissolved.

The remaining question in the record is whether or not the assessment of damages for attorney's fees for services in securing the dissolution of the temporary injunction should be allowed before the merits of the bill are passed upon, it being contended by the appellant such assessment of damages is premature. Section 12 of the Injunction act provides as follows: "In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: *Provided*, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

While there appears to have been a conflict in the earlier decisions of this court on this question, an examination shows such to have been due to the different statutes in force at the time of such decisions. The rule in this State has always been that where a temporary injunc-

tion is ancillary to the cause of action, damages may be assessed upon the dissolution of a temporary injunction without disposing of the merits of the bill. It was, however, held in *Terry v. Hamilton Primary School*, 72 Ill. 476, that where the only prayer of the bill was for an injunction, it was premature and improper to assess damages until a final disposition of the case. This was the rule in this State subsequent to an amendment to the law of 1861. Section 1 of the Injunction act of 1861 was the same as section 12 of the Injunction act of 1874, with the exception that the proviso in section 12 was added. In the case of *Shackleford v. Bennett*, 237 Ill. 523, the statutes and decisions on this matter were considered. In that case the only relief sought by the bill was a perpetual injunction. A temporary injunction was issued and later dissolved without passing on the merits of the bill. The question there arose whether or not action might be maintained on an injunction bond after the dissolution of the temporary injunction and before the disposition of the injunction bill. It was there held that since the addition of the proviso now in section 12 of the Injunction act the rule is that upon dissolution of an injunction there is immediate cause of action upon the bond accruing to the party against whom the injunction is directed. Such being now the rule in this State, the circuit court has authority under said section 12 to assess damages where suggestions for the same are filed. The Appellate Court, therefore, did not err in sustaining the judgment of the circuit court assessing said damages.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

Mr. JUSTICE THOMPSON, dissenting.

(No. 12043.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. OLIVER F. PAISLEY *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919.

1. CRIMINAL LAW—*co-partners should be indicted as individuals.* In an indictment against co-partners in the banking business for unlawfully receiving deposits while insolvent it is proper to charge the defendants jointly as individuals, and a mere averment that they were partners does not amount to charging the offense against a partnership.

2. SAME—*indictment may join all parties alleged to be guilty of same offense.* It is proper to include in an indictment all parties who are alleged to be jointly guilty of the same offense, including those who are accessories before the fact.

3. SAME—*banking partners may be jointly guilty of receiving deposits while insolvent.* Although the statute describes the persons in the singular number who may be guilty of receiving deposits in the banking business while knowing themselves to be insolvent, the crime described is not such as only one person can commit but one which two or more persons, as partners or as individuals acting jointly, may commit.

4. SAME—*word "feloniously" in indictment may be surplusage.* An indictment charging a misdemeanor is not vitiated by the use of the word "feloniously," as that word may in such case be treated as surplusage.

5. SAME—*when bankers' books may be introduced against them.* Where bankers are being tried for receiving deposits while knowing themselves to be insolvent, books which they have delivered to their receiver in bankruptcy and from whom the State's attorney has secured them are admissible without further proof of their accuracy, and, whether the bankruptcy proceedings were voluntary or involuntary, the admission of such evidence does not compel the defendants to give evidence against themselves.

6. SAME—*papers seized from defendant are admissible if otherwise competent.* Papers and documents illegally seized from a defendant's possession are admissible in evidence against him in a criminal case if they are otherwise competent, and courts will not take notice of how they were obtained.

7. SAME—*the future income from possible improvements is not admissible to prove present value of property.* Testimony of the probable cost of improvements to be placed on lands or lots and the probable net rentals or income to be derived therefrom when

the improvements have been constructed is inadmissible to show the present value of such lands or lots, but such proof must be confined to the market value of the property for purposes to which it is adapted and for which it will command the best price.

8. *SAME—court is not required to write instructions.* The court is not required to write instructions but only to give those submitted when they are proper, and where an instruction as to the form of the verdict, in describing the punishments, reverses their statutory order, the defendants' counsel cannot complain, on review, that such instruction misled the jury in fixing the punishment, as counsel might have explained the statute by a proper instruction if he had seen fit to do so.

9. *SAME—other acts of embezzlement not connected with those charged are not admissible.* Upon the trial of parties charged with embezzlement it is not competent for the prosecution to prove that the defendants had committed other and distinct acts of embezzlement or other crimes in no way connected with the commission of the crime charged.

10. *SAME—witness cannot express opinion of solvency of bankers charged with receiving deposits while insolvent.* The opinion of a witness should form no part of the verdict of a jury, and in a prosecution of bankers charged with receiving deposits while insolvent an expert accountant cannot express his opinion that the defendants were insolvent, although he may have been thoroughly posted on the values of all the assets and other matters necessary to determine the question of solvency.

11. *SAME—in a prosecution of bankers the depositors cannot testify that their deposits were lost.* In a prosecution of bankers charged with receiving deposits while insolvent, testimony of depositors is admissible only to show debts owed by the defendants, but depositors should not be permitted to testify, in terms, that their deposits were lost, and where it is evident, after quite a number of such witnesses have so testified, that the purpose of such evidence is merely to prejudice the jury, objections made while the last of such witnesses is testifying are made in apt time.

12. *SAME—when an instruction as to considering value of surrendered stock should be given.* Where there is evidence tending to show that the defendant bankers had been compelled by threats to surrender, without consideration, shares of stock of value, the defendants are entitled to have the jury instructed that in determining whether defendants were insolvent they should take into consideration the value of the stock so surrendered as assets of the defendants.

CARTER, J., dissenting.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Criminal Court of Cook county; the Hon. GEORGE K. MARTIN, Judge, presiding.

MARSHALL SOLBERG, and HARRY L. SHAVER, (COLIN C. H. FYFFE, of counsel,) for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and EDWARD C. FITCH, (EDWIN J. RABER, and EDWARD E. WILSON, of counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Plaintiffs in error, Oliver F. Paisley and James T. Paisley, brothers, (hereinafter referred to as defendants,) impleaded with William H. Paisley, their father, were convicted in the criminal court of Cook county of unlawfully receiving a deposit of \$700 from Mrs. Margaret Basch at the North Shore Savings Bank, in Chicago, on September 16, 1916, then knowing themselves to be insolvent. Defendants were sentenced May 21, 1917, to the penitentiary for a term of three years each and were each fined in the sum of \$1400. William H. Paisley was sentenced to the penitentiary for one year but was not fined in any sum, and the jury by their verdict recommended clemency in his case. A writ of error was prosecuted to the Appellate Court for the First District, where the judgment was affirmed as to the defendants but was reversed and the cause remanded as to William H. Paisley. Defendants have sued out a writ of error to have the record reviewed by this court.

Defendants had been engaged in the real estate and banking business in Chicago since 1908, when they organized the Edgewater Bank. This bank was dissolved and its assets and liabilities were taken over by the Edgewater State Bank, organized by the Paisleys and others, April 11, 1914,

with a capital stock of \$200,000 and \$50,000 surplus. The capital stock was divided into 2000 shares, for which defendants and their father subscribed for 1350 shares. The Paisleys completely severed their connection with this State bank June 30, 1915. At this time they were also conducting, as partners, their private bank, known as the Summerdale Savings Bank, at 5302 North Clark street, organized in 1912. When convicted the three Paisleys were operating this private bank and two other private banks,—the North Shore Savings Bank, at 5545 Broadway, and the Grace Street Branch, at Broadway and Grace streets,—organized by them July 1, 1915, and August 1, 1916, respectively, and all three about a mile apart. These banks were not conducted as separate and distinct banks but as one entity. These banks had 1123 commercial and 2037 savings depositors when they finally voluntarily closed, September 19, 1916. Oliver F. Paisley managed the North Shore Savings Bank, James T. Paisley the Summerdale Savings Bank and Joseph B. Donahoe the Grace Street Branch. On September 20, 1916, Oliver F. Paisley filed a bill in the superior court of Cook county against his brother and father to dissolve the co-partnership and to liquidate and for the appointment of a receiver. A day or two later a petition in involuntary bankruptcy was filed in the United States district court for the northern district of Illinois, and the Chicago Title and Trust Company was appointed receiver in bankruptcy, took charge of the property and was later elected trustee in bankruptcy.

The indictment charges the defendants jointly as individuals and is not an indictment of their firm or co-partnership as an entity. There was an averment that they were doing a banking business, as partners, under three different firm or bank names, but the offense was not charged against any firm or bank as an entity. That is the usual and proper way in which to indict individuals who are co-partners. (*Meadowcroft v. People*, 163 Ill. 56.) It is always

proper to include all persons in an indictment who are jointly guilty of the same offense, including those who are accessories before the fact. The fact that the statute describes the persons in the singular number who may be guilty and be punished for this offense furnishes no sufficient ground for the contention that only one and not two or more persons can be properly indicted for the offense. Such a construction would be a strained and unnatural one of a statute clearly leveled against any and all persons who may, singly or jointly, violate it. The crime described is not such as only one person can commit, but one which two or more persons, as partners or as individuals acting jointly, may commit. (*State v. Smith*, 62 Minn. 540.) In the case cited a similar statute was so construed. Neither was the indictment vitiated by charging that the act was unlawfully and "feloniously" committed. The offense is only a misdemeanor, and by the use of the word "feloniously," as made in this indictment, a felony is not charged. The word "feloniously" may be regarded as surplusage. (Wharton's Crim. Pl. & Pr. sec. 261; 1 Bishop's New Crim. Proc. sec. 537; *State v. Slagle*, 82 N. C. 653; *Commonwealth v. Philpot*, 130 Mass. 59; *State v. Sparks*, 78 Ind. 166; *Staeger v. Commonwealth*, 103 Pa. 469; *State v. Crummev*, 17 Minn. 72.) Other courts of high standing hold otherwise, but the more numerous authorities are the other way and their reasoning more convincing.

The court properly permitted the books of all three of the defendants' banks to be used in evidence and without further proof of their accuracy or correctness. They were introduced as declarations against interest and were properly identified as defendants' books and their entries as entries made at their instance. Further proof of correctness was not necessary for such purpose. (*Loewenthal v. McCormick*, 101 Ill. 143.) These books were secured by the State's attorney's office from the receiver in bankruptcy, who had gotten them from defendants' receiver appointed

on their bill. Consequently section 10 of article 2 of our constitution, providing "no person shall be compelled in any criminal case to give evidence against himself," was not violated. (*People v. Hartenbower*, 283 Ill. 591.) The rule is the same in this respect whether the bankruptcy proceedings are voluntary or involuntary. Defendants were not compelled by the court to produce books or papers in their possession, and the cases of *Lamson v. Boyden*, 160 Ill. 613, and *Manning v. Mercantile Security Co.* 242 id. 584, are not in point. Even papers and documents illegally seized from a defendant's possession are admissible in evidence against him in a criminal case if otherwise competent. Courts will not take notice of how they were obtained. (*Gindrat v. People*, 138 Ill. 103; *Trask v. People*, 151 id. 523.) Other States having similar constitutional provisions have made similar holdings upon the question now before us. (*State v. Strait*, 94 Minn. 384; *Commonwealth v. Ensign*, 228 Pa. 400.) In affirming the judgment in the latter case the Supreme Court of the United States held that the fifth amendment to the Federal constitution, providing that no person "shall be compelled in any criminal case to be a witness against himself," was not violated by such admission of evidence, and that if it was, the said amendment was not obligatory upon the governments of the several States and regulates the procedure of the Federal courts, only. *Ensign v. Pennsylvania*, 227 U. S. 592; *Johnson v. United States*, 228 id. 457.

The complaint that F. M. Zeiler, of F. M. Zeiler & Co., and W. M. Richards, of the Chicago Savings Bank and Trust Company, were permitted, over the objections of defendants, to introduce secondary evidence of the contents of certain book entries of their companies for the purpose of establishing the dates of certain loans to defendants, is not meritorious. It was not disputed that the loans were in fact made, and there was no specific objection made that the evidence offered was secondary evidence.

Defendants sought to show the value of a certain leasehold, known as the 99-year school lease at Broadway and Clark streets, upon the supposition that a building to cost not less than \$100,000 had been completed on the property in accordance with certain plans and a contract entered into with the school district nearly two years before the banks closed, the building having never been built or begun. Proof of probable cost, probable rentals and probable net income of the property was offered in this connection, and proof was also offered that certain of the floors or apartments had been contracted for and the rentals to be paid therefor agreed on in case the building should be completed. The court properly excluded this testimony as speculative in its nature and as evidence of the value of the property under conditions that did not exist and might never exist while property of the defendants. Testimony of the probable cost of improvements to be placed on lands or lots and the probable net rentals or income to be derived from such lands or lots when such improvements have been constructed is uniformly held inadmissible to show present value of such lands or lots. (*Burt v. Wigglesworth*, 117 Mass. 303; *Tallman v. Metropolitan Railway Co.* 121 N. Y. 119; *Hamilton v. Pittsburg, Bessemer and Lake Erie Railroad Co.* 190 Pa. St. 51; 13 Ency. of Evidence, 436.) They could only prove the market value of the leasehold for purposes to which adapted and which would command the best price.

The lower court, in its instructions to the jury, gave three like forms of verdict for each defendant, the last being for the verdict of not guilty. The other two forms were connected with the word "or," the first form as to Oliver F. Paisley being in this language: "We, the jury, find the defendant Oliver F. Paisley guilty in manner and form as charged in the indictment, and we fix his punishment at imprisonment in the penitentiary for a period of years and a fine of dollars." The second form of verdict was for a fine, only. Section 25a of the Criminal Code

provides that upon conviction the defendant shall be deemed guilty of embezzlement and shall be fined in double the amount of the sum so embezzled and fraudulently taken, and in addition thereto may be imprisoned in the penitentiary for not less than one year and not more than three, and the court so instructed the jury in its first instruction for the People. We agree with defendants' counsel that under the instructions as given the jury were not only likely to be, but were, confused as to which punishment was mandatory and which was in their discretion. This appears from their verdict against William H. Paisley and their recommendations as to him. This may have occurred by the court putting imprisonment as the first punishment to be inflicted, in the first form of verdict. It is equally clear, however, that defendants' counsel, by offering an instruction in their behalf making it clear that whether or not imprisonment should be fixed for each defendant was a matter of discretion with the jury after fully and fairly considering all the evidence in the case, might have altogether removed all confusion and doubt. The confusion brought about, as aforesaid, must be attributed largely to the action of counsel for defendants in not guarding the point of danger by instructions. The court is not required to write instructions but only to give those submitted to him, when proper. We would have been better satisfied with the instructions as to form of verdicts had the court named the first punishment as a fine and the second as both fine and imprisonment, as the statute so placed them. We are not, however, prepared to hold that it was error not to do so, as further instructions would have removed all erroneous impressions the jury may have received.

The Edgewater State Bank assumed all liability of the Edgewater Bank to depositors of the latter bank when the former took over the assets of the latter. The Paisleys in turn, and in consideration thereof, signed a guaranty to the Edgewater State Bank on April 11, 1914, by which they

guaranteed unconditionally and without reservation, the full and prompt payment of the principal and interest to the Edgewater State Bank as the same comes due or may become due under extensions and renewals given, of all loans, discounts, credits and overdrafts held by the Edgewater Bank as an offset to its deposits and accepted by the Edgewater State Bank, including all costs, attorneys' fees and other outlays in enforcing the same and the guaranty. The amount of their guaranty on their liability therein was not to exceed in amount \$198,398.44. The guaranty was to be a continuing one and remain in full force and apply to all loans, discounts, credits and overdrafts, and renewals and extensions thereof, until they were fully paid. The specific assets so guaranteed were not specifically set out otherwise than as above set forth. The guaranty was sufficient in form and sufficiently definite as to the assets guaranteed. The assets so guaranteed were all that was taken over by the Edgewater State Bank from its predecessor, of the description aforesaid, and the limit of liability on all of them was the sum mentioned.

The total assets thus taken over by the Edgewater State Bank, including notes of the Paisleys to the Edgewater Bank, loans, discounts, overdrafts, bonds, deposit accounts with other banks, and cash, were \$345,164.06. This amount was further increased by another item,—building, vaults and grounds,—fixed at \$50,000, and which it was conceded is not covered by said guaranty. A State bank examiner in December, 1914, informed the other officers of the Edgewater State Bank that the defendants were insolvent and that that bank ought not to continue longer with the Paisleys as officers thereof. The result was that the Paisleys resigned as officers of the bank December 12, 1914, and were only nominally connected with the bank from thence up to June or July following, when all their connection with it ceased. In May, June and October, 1914, the Paisleys had taken up \$20,895.30 of the bad as-

sets so guaranteed, and on December 22, 1914, they took up \$21,303.48 more of the guaranteed assets, as shown by the testimony of the cashier of the Edgewater State Bank. About April, 1914, the Paisleys borrowed of various banks in Chicago \$120,000 or more, and put up as collateral security therefor certificates of stock of the Edgewater State Bank owned by them. This borrowed money, as appears from the record, was paid in to the Edgewater State Bank on their subscriptions for stock. These loans in 1916 had been reduced by the Paisleys to about \$100,000 by payments. On March 20, 1916, a State bank examiner required an assessment of \$120,000,—\$60 per share of stock,—to be levied and paid by the stockholders of said bank to make good the bad assets still held by it. The undisputed evidence given by one of the State's witnesses, the former cashier of the bank, is that of said sum of bad and depreciated assets \$50,000 was assets taken over by it from the Broadway State Bank on July 23, 1915, referred to as one of the Lorimer banks. Another \$15,000 thereof was for depreciation on the item carried by it as building, grounds, fixtures, etc. It is also undisputed that the remainder (about \$55,000) of that assessment is all that is chargeable to defendants under their guaranty. The proof also shows that \$1088.79 of those bad assets of defendants has been collected by the Edgewater State Bank since the assessment was made. So the entire claim under the guaranty of the Edgewater State Bank could not have exceeded, under the proof in this record, the sum of \$55,000 when the banks of the defendants finally closed.

On April 21, 1916, representatives of the Edgewater State Bank and of the various other banks from whom the Paisleys borrowed money on their stock, met at the Continental and Commercial National Bank of Chicago and deliberated until after twelve o'clock that night. The Paisleys were called in at the conclusion of the conference but were not present during much of the deliberations of the

same. The result was, according to the testimony for the defendants, that the Paisleys, being unable to pay the assessment on their stock, were forced by threats of litigation and of throwing them into bankruptcy and closing their other banks to transfer and deliver up between 1100 and 1200 shares of their stock without receiving therefor any consideration,—not even so much as a credit upon any of their indebtedness to the members of said conference,—and to make new notes to said banks for the money they had borrowed, with agreements to pay thereon \$500 monthly thereafter. Three of said banks surrendered their certificates of stock held as collateral (650 shares) to a syndicate of the Edgewater State Bank, refusing to pay the assessment. Four of those banks retained their certificates, paid the assessments and now claim to own the stock absolutely. The Edgewater State Bank sold the stock so transferred, to their other stockholders or others who would purchase the same, and now claim that the Paisleys own no interest therein or in the bank and are entitled to no credit by reason of said stock. One of the interested witnesses styles this deal as an unconditional sale of the Paisleys of all right, title and interest in the stock. There is no claim that the Paisleys received anything for such transfers. It was proved on the trial that the Edgewater State Bank requires \$32,000 to get out whole on the Broadway State Bank deal, and that the book value of the Edgewater State Bank stock was on April 21, 1916, more than \$105 per share and more than \$104 per share when defendants' banks closed. Defendants held also about 30 other shares of stock of said bank when their banks closed, upon which the assessment had not been paid. A great part of the evidence for the State was devoted to defendants' connection with the State bank, and the greater part of their debts is shown to have grown out of their relation to said bank and as aforesaid.

Whatever may be said as to the transactions of the Paisleys, it is apparent that their stock surrendered was of

very considerable value, and that the demand on them for the surrender of this stock without even a credit given them as a consideration was a very unconscionable act upon the part of the banks who thus obtained it, whether by duress or otherwise. Not a witness in this case ever offered to swear that the value of that stock was ever less than par. The testimony of the State's witnesses even shows that its actual value at the time of the trial was equal to the par value. It was a question for the jury to determine what the truth was as to just how and in what manner this alleged sale was made.

Upon the foregoing evidence the defendants asked the court to instruct the jury, in substance, that no person has a legal right to compel another, by threats or by duress, to surrender his interests in his property, and that if they believed from the evidence that the defendants were induced to surrender their interests in the capital stock by reason of threats made to them that unless they did so the persons making such threats would take such action that the banks of defendants would be closed, then such surrender was without consideration and void; and in determining the question in this case whether or not the defendants were insolvent, they are entitled to have the jury take into consideration the value shown of their said stock at the time of surrender and as an asset or property of the defendants. It was therefore error in the court to refuse to give this instruction. There is no objection pointed out by the State to this instruction. It is practically conceded that defendants were entitled to credit for said stock in some sum, and counsel for the State say: "The defense offered no instruction controlling this evidence. The jury had the entire matter, and it is presumed that if defendants had any interest in such stock the jury would have taken it into consideration in determining whether or not they were solvent." These statements must be the result of an oversight. Two instructions were offered by defendants in substance

as above set forth. Both were refused and no instruction of similar import was given.

The court also committed serious error in permitting the State's attorney to prove four other distinct crimes against these defendants with the same minutia and detail as if the defendants were on trial for those offenses, the commission of which had no tendency to prove the offense charged in the indictment. The first three of these offenses were embezzlements, the first one being embezzlement of the proceeds of a collection for C. O. Anderson of a certificate of deposit for more than \$2300 issued by a bank in Sweden. The second was the embezzlement of the proceeds of a note for \$800, secured by a trust deed in favor of one Russell and who placed it in one of the defendants' banks for collection for him. This matter was entirely settled up with Russell in July, 1915, and was not even an indebtedness against the defendants when the banks closed. The third was the embezzlement of a certain note and mortgage for \$2400, the property of the mother of Clarence H. Wright, placed in defendants' banks for sale and payment to her in the summer of 1915. Defendants did not sell the same but pledged the securities to secure a loan of O. F. Paisley at the Philip State Bank. The witnesses in this case and in the first case were permitted to state that they called for the money on their securities several times and that false statements were made to them in regard to the collection or sale of said securities, and that the defendants had not settled for the proceeds of the first collection, which had long since been collected, and had not made it known that the other securities were pledged, until after the banks were closed. The fourth offense was one of obtaining money by false pretense from the Western Union Telegraph Company by means of a false statement of the financial condition of the North Shore Savings Bank at the commencement of business June 10, 1916, and which statement said company had requested of that bank with a

view to carrying a deposit account with it. Every detail of this matter was gone into by the witnesses, including the further statement that in this account, obtained as aforesaid, there was \$453.28 unpaid when the banks closed. The only part of this evidence that could under any circumstances have been material or admissible was simply the fact that when the banks closed the defendants owed those parties, or three of them, certain amounts of money that had not been paid and that said parties were not indebted to them. There was no pretense of using this evidence for that purpose, because they had already proved those matters by the books and by the evidence in connection with the books, and did not introduce over a sixtieth part of the more than three thousand depositors that had deposits in the banks when they closed. Upon trial of parties charged with embezzlement it is not competent for the prosecution to prove that defendants had committed other and distinct acts of embezzlement or other crimes in no way connected with the commission of the crime charged. *Kribs v. People*, 82 Ill. 425.

Frank M. Spohr, an expert accountant, in his examination, while expressly stating that he did not know the value of certain assets of defendants, testified, over the defendants' objections, that in his opinion the defendants were insolvent. Regardless of the question whether or not he was thoroughly posted upon the values of all the assets and other matters necessary to determine the question of solvency of the defendants, it is not permissible in such a case for a witness to express his opinion on the question of solvency, because that was one of the ultimate facts upon which the jury had to make their finding. No witness can thus invade the province of the jury, expert or otherwise. This court has so frequently ruled upon this question that it hardly seems necessary to refer to the decisions. The opinion of a witness should form no part of the verdict of a jury. (*Hoener v. Koch*, 84 Ill. 408; *Fellows-Kimbrough*

v. *Chicago City Railway Co.* 272 id. 71.) Other States have made the same holdings in offenses like the one now before us. *State v. Stevens*, 16 S. Dak. 309; *State v. Myers*, 54 Kan. 206; *Freeman v. State*, 108 Miss. 818.

Twenty-two witnesses,—twelve women, one newspaper boy and nine men,—were called to testify that they had deposits in the defendants' banks when they closed, and that they never had been paid their deposits and owed defendants nothing. Some of the women were working women, and some of them testified to their children having small deposits there for Christmas and for various purposes, all detailed. One of them told about her boy saving his money to buy an American flag, and two others testified about two children saving their money for their graduation day, and that none of them got their money back. Three of the men were janitors and four others were men working at various trades. A number of these witnesses testified to receiving letters from the defendants enclosing notes for their deposits, with promises to pay in the future. Some of these witnesses testified, in answer to direct questions and over the objections of the defendants, that they had lost their deposits. Whether the deposits were lost or not was one of the ultimate facts to be found by the jury as to the deposits in question, and it was not proper for any witness to testify in express terms that his deposit was lost. All of the foregoing evidence should have been excluded after it became manifest that it was used or to be used for no legitimate purpose except to unnecessarily prejudice the jury. Had the State in good faith desired to introduce all the depositors, or any considerable number of them, for the purpose of showing the amount of debts owed by the defendants, to do so it would have been proper to prove only that the defendants owed the depositors and that they owed the defendants nothing, and the amount of such debts. It is claimed by the State that the letters and notes of the defendants were introduced in evidence for the purpose of

proving a partnership. The partnership was already proved by other evidence and was not denied, and the debts were proved by the books and the witnesses testifying concerning the same, and were not denied. Objections were not made to all of the testimony of these witnesses but only to a few of them towards the last, when the purpose of the examinations became manifest, and such objections were therefore made in apt time. Not over forty or fifty witnesses of the three thousand or more who had deposits in the defendants' banks were called to testify, and it is apparent that the testimony of the witnesses now under consideration could be of no aid in determining the whole amount of the deposits or in determining any issue in the case.

The defendants rightly complain of the misconduct of E. J. Raber, the attorney who examined and cross-examined witnesses for the State, in the examination of the witness Oscar Miller, an employee of the North Shore Savings Bank when defendants' banks closed. This witness testified positively, and he is not contradicted by any evidence in the record, that he was called for consultation a number of times before this trial, to the office of Raber, who at those times called him a three-year-old, a rummy and a fool, in language too vile to be here repeated. Raber also told him that when any witness did not want to come to his office they would simply send a policeman after him, and also told him the grand jury had threatened to indict him twice and that he saved him on both occasions. He apparently had this witness drilled as to how he should answer questions on the trial. More than twenty different times in his examination Miller was asked to state from what moneys the salaries of the Paisleys and other employees, and various checks drawn by the Paisleys on their banks, were paid, and he invariably answered, over the defendants' objections, that they were paid by the depositors' money or from moneys deposited by them. This testimony was clearly erroneous and unfair to defendants, but ob-

jections to it were promptly overruled in every instance. Those salaries and checks were paid, as a matter of fact, from the cash in the banks, which came from all sources, as any and all checks were paid. This witness refused to testify about the incidents relating to the C. O. Anderson collection on the bank in Sweden on the ground that it would incriminate him. In the discussion that arose on this question Raber said in the presence of the jury, "I will say further, that if this witness wants some incrimination done, as far as that is concerned we can give it to him."

It is as clear as any proposition can well be made that the defendants have not had a fair and impartial trial in this case, and that the judgment should be reversed and the cause remanded for the errors in the rulings of the court and for the misconduct of the State's attorney. It is repeatedly urged in the brief and argument of the State that the defendants' guilt is so clearly established that they are not entitled to a new trial, even if it be conceded that all the errors assigned are well founded. This assertion must come from a misconception of the law of this case, wherein the jury are judges not only of the question of guilt or innocence but of the amount and character of punishment that should be imposed. The defendants in this case have been given the greatest penalty in the way of imprisonment that is fixed by the statute, when it was entirely a discretionary matter with the jury as to whether or not imprisonment should be imposed as part of the penalty. No fair-minded man can say, it seems to us, that the errors in this record are not such as to demand a reversal of the judgment.

The judgments of the Appellate and criminal courts are reversed and the cause remanded to the criminal court.

Reversed and remanded.

Mr. JUSTICE CARTER, dissenting.

(No. 12695.—Decree affirmed.)

JOHN M. MITCHELL, Appellant, vs. FRANK O. LOWDEN,
Governor, et al. Appellees.

Opinion filed June 18, 1919.

1. CONSTITUTIONAL LAW—*publication of statute creating a debt may be provided for in act itself.* Under section 18 of article 4 of the constitution, requiring the publication of a statute creating a debt before the act is submitted to the vote of the people, a separate act is not necessary to confer authority for the publication, but the legislature may provide therefor by separate resolution or vote or by a provision in the act itself.

2. SAME—*constitution must be construed with reference to its object.* A constitutional provision must be construed, like a statute, with reference to the object to be accomplished, and when the real purpose is apparent but the words, followed literally, lead to an absurd consequence, there is sufficient reason to depart from the language.

3. SAME—*what vote of the people is required to adopt a statute creating a debt.* Under section 18 of article 4 of the constitution an affirmative vote by a majority of the voters at an election for members of the General Assembly is required for the adoption of a statute imposing an indebtedness upon the State, and a majority of the votes cast for members of the General Assembly, which, owing to our system of minority representation, would be literally a majority of three times the number of voters, is not required.

4. SAME—*creation of a debt and levy of tax to pay interest may be included in one act.* Under section 18 of article 4 of the constitution, requiring that a law authorizing the contracting of a debt shall be submitted to the people with a law levying a tax to pay the interest on the debt, the provision for the payment of the interest may be included in the act creating the debt, and two separate acts are not required.

5. SAME—*provisions creating debt and levying tax to pay interest need not be voted on separately by legislature.* Where a law is passed imposing a liability upon the State, section 18 of article 4 of the constitution requires that the legislature provide for the levy of a tax to pay the interest on the debt; but where the provision for the levy of the tax is included in the act creating the debt, section 12 of article 4 of the constitution does not require that each of the provisions be voted on separately by the legislature. (*People v. McBride*, 234 Ill. 146, followed.)

6. SAME—*provisions necessary to carry out purpose of act need not be expressed in title.* The object of the constitutional restriction that an act shall not include subjects not expressed in the title is to prevent the inclusion in the act of provisions foreign to the subject of legislation and which have no legitimate tendency to accomplish the purpose of the act as expressed in the title, but provisions, however diverse, which tend to make effectual the purpose so expressed may be included in the act though not expressed in the title.

7. SAME—*act of 1917 for State-wide system of hard roads does not impose burdens on owners of motor vehicles.* The act of 1917 for a State-wide system of hard roads, in providing that the interest on the bonded indebtedness shall be paid out of the road fund created by section 19 of the Motor Vehicle act, does not impose any burdens on the owners of motor vehicles or grant any immunities to other property owners, as the act does not in any way affect the amount, time or manner of the payment of the fee for the registration of motor vehicles, as required by the Motor Vehicle act.

8. SAME—*act of 1917 for State-wide system of hard roads does not assume debts of counties.* Section 10 of the act of 1917 for a State-wide system of hard roads, providing that use may be made of such roads already constructed by counties, and that in such case an amount of money equal to the share of the actual cost of such road paid by the county shall be allotted to the county, merely provides for the payment by the State of the cost of a road of which it takes control as a part of the State-wide system, and the State assumes no debt of the county but pays in cash for what it purchases.

9. SAME—*in specifying objects of appropriation various items of expense need not be stated.* Where money is appropriated for the single purpose of constructing a State-wide system of hard roads, the constitution does not require an itemization, in detail, of every expenditure and of every contract required in the construction of the various roads contemplated in the system for which the appropriation is made.

10. SAME—*legislature has absolute control over public highways.* Subject to constitutional limitation the control of the legislature over the public highways is absolute, and the legislature may give jurisdiction over the highways to such authorities as it may see fit and change the control of them at pleasure.

11. SAME—*act of 1917 for State-wide system of hard roads is not local.* While the act of 1917 for a State-wide system of hard roads does not include all the highways in the State, it provides a system of highways affording reasonable connection with one

another and with the different communities and principal cities of the State and is not a local or special law. (*Martens v. Brady*, 264 Ill. 178, followed.)

12. SAME—the act of 1917 for State-wide system of hard roads does not delegate legislative or judicial power to department of public works. The act of 1917 authorizing the construction of a State-wide system of hard roads under the supervision of the department of public works and buildings does not delegate either legislative or judicial power to that department but the questions which are left for determination in the supervision of the work are ministerial.

13. SAME—what is legislative power and what is judicial power. Legislative power is the power to enact laws or declare what the law shall be, while judicial power adjudicates upon the rights of citizens and to that end construes and applies the law.

APPEAL from the Circuit Court of Sangamon county;
the Hon. ELBERT S. SMITH, Judge, presiding.

GREEN & RISLEY, for appellant.

EDWARD J. BRUNDAGE, Attorney General, ALBERT D. RODENBERG, EDWARD C. FITCH, NOAH C. BAINUM, and ARTHUR R. HALL, for appellees.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

The Fiftieth General Assembly passed an act entitled "An act in relation to the construction by the State of Illinois of a State-wide system of durable hard-surfaced roads upon public highways of the State and the provision of means for the payment of the cost thereof by an issue of bonds of the State of Illinois." (Laws of 1917, p. 696.) By this statute it was enacted that a State-wide system of durable, hard-surfaced roads be constructed by the State upon its public highways, and that for the purpose of providing means for the payment of the cost of such construction, the State, through its officers, be authorized to issue, sell and provide for the retirement of bonds to the amount of sixty million dollars. The sum of sixty million dollars,

to be derived from the sale of bonds, was appropriated to the department of public works and buildings, and the act provided for the levy of an annual tax of an amount sufficient to pay the interest as it should accrue and the principal of the bonds at maturity, provided that no tax should be levied in any year in which a sufficient amount had been appropriated from other sources of revenue to pay the interest and principal of the bonds falling due that year. The construction of the State-wide system of roads was placed under the general supervision and control of the department of public works and buildings, which was authorized to cause the roads to be constructed at the earliest possible time consistent with good business management. It was declared that the general location of the routes upon which the proposed roads were to be constructed should be substantially as described in section 9, so as to connect with each other the different communities and principal cities of the State, provided that the department of public works and buildings should have the right to make such minor changes in the location of the routes as might become necessary in order to carry out the provisions of the act. Section 9 described the general location of forty-six routes by naming the termini of each, giving the general direction of the road from one terminus to the other, and stating that such route afforded certain named places and the intervening communities reasonable connections with each other, covering the State with a net-work of roads reaching every county in the State. On February 19, 1919, John M. Mitchell, a citizen and tax-payer residing in Wabash county, filed a bill in the circuit court of Sangamon county against the Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Director of Public Works and Buildings, and other officers of that department, the purpose of which was to have the act declared unconstitutional and the defendants enjoined from enforcing it. Objections were alleged to the manner of its adoption, to its title and to its

contents. The defendants answered, a replication was filed, the cause was heard upon the pleadings and evidence, and the court found the issues for the defendants and entered a decree dismissing the bill for want of equity, from which the complainant has appealed.

The cause was submitted at the April term, and an early decision being desired on account of the public interest involved, a judgment was rendered at that term affirming the decree of the circuit court for the reasons now to be stated.

The objections made to the adoption of the act were, that it was not constitutionally submitted to the people as required by section 18 of article 4 of the constitution, and did not receive the majority of votes as required by that section.

Before the debt of sixty million dollars created by this act could be contracted, section 18 of article 4 of the constitution required that the law authorizing it should have been submitted to the people at a general election and have received a majority of the votes cast for members of the General Assembly at such election; that the General Assembly should provide for the publication of the law for three months, at least, before the vote of the people should be taken upon the same; that provision should be made at the time for the payment of the interest, annually, as it should accrue, by a tax levied for the purpose or from other sources of revenue, and that the law levying the tax should be submitted to the people with the law authorizing the debt to be contracted. The act itself provided that before it should go into full force and effect it should, at the general election in November, 1918, be submitted to the people and receive a majority of the votes cast for members of the General Assembly at that election, and it directed that the Secretary of State should cause publication of the act to be made once each week for three months, at least, before the vote of the people should be taken upon the act, in at least two daily newspapers,—one published in Springfield

and one in Chicago. The act was published in all respects in accordance with this direction and the law was submitted to the people and voted on at the election in accordance with the terms of the act. The canvass of the vote by the State canvassing board showed the whole number of votes cast at the election was 975,545, the whole number of votes cast for members of the General Assembly was 898,821, the whole number of votes cast for the act was 661,815 and the whole number against the act was 154,296, and that the majority in favor of the act was 212,404. The appellant insists that the finding by the State canvassing board of this majority in favor of the act is erroneous, for the reason that the canvassing board had regard to the number of voters (898,821) who voted for members of the General Assembly instead of the number of votes cast by such voters for members of the General Assembly, which number of votes was three times the number of voters, and that by a proper construction of the law the majority of the votes cast at the election for members of the General Assembly was not cast for the act.

The objection to the submission of the act is based upon the requirement of the constitution that "the General Assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same," and the argument is that only by the enactment of a statute can the General Assembly cause publication of the law to be made. There is no basis for this argument. The General Assembly may provide in the act itself, by separate resolution or by an independent law, for the publication. The object of the publication is to give notice to the people that they may have an opportunity to express their will by their votes. While the publication, if not authorized by the General Assembly, is of no validity, a statute is not necessary to confer authority. A vote directing it is sufficient. The statute which was enacted by the legislature was really a law submitting to the people a

proposition to be voted upon at the general election for a law on the subject of State roads, to become effective upon an affirmative vote by the people. The law submitting the proposition became effective on July 1 and bound everyone to comply with its provision to submit the proposal to a vote, and the Secretary of State was bound to publish the law.

It is seriously contended, however, that the votes cast for members of the General Assembly were three times the number taken by the State canvassing board as the basis of its finding,—that is, 2,696,463 instead of 898,821. The latter is the number of voters who cast votes for members of the General Assembly, and while the votes cast in favor of the law numbered nearly three-fourths of all the voters, it is argued that the language of the constitution, and the law itself, is not obscure or uncertain but is definite and unambiguous and leaves no room for construction; that the total number of votes cast for members of the General Assembly was 2,696,463; that nothing less than 1,348,232 is a majority of that number, and that less than half that number of votes were cast in favor of the law. This is literally true, but it is perfectly clear that it is not the meaning of the constitution that the law did not, therefore, receive a constitutional majority, for such meaning involves the absurdity of holding that the framers of that instrument, and the people in adopting it, intended to prohibit the creation of a debt, with the exception specified in section 18, unless the proposition for its creation should receive at an election a greater vote than all the electors were entitled to cast. It is conceivable that they might have desired to prohibit the creation of a debt, but not that they would take this indirect method of prohibiting while appearing to permit. A constitutional provision must be construed like a statute with reference to the object to be accomplished, and when the real purpose is apparent the language must be construed so as to carry the purpose into

effect. It is not to be presumed that a provision was inserted in a constitution or statute without reason or that a result was intended inconsistent with the judgment of men of common sense guided by reason. Not the letter of the law, only,—its mere words,—but its spirit and object, must be taken into consideration, and when a particular intent to effect a specific purpose is manifest respect must be paid to that intent. When the words of a statute, followed literally, lead to an absurd consequence there is sufficient reason to depart from the language. (*Perry County v. Jefferson County*, 94 Ill. 214.) The intention of section 18 of article 4 of the constitution was to restrict the General Assembly in imposing an indebtedness upon the State to cases where a majority of the voters at an election for members of the General Assembly should vote in favor of the act incurring the liability, and that is the construction which we give to its language.

Section 18 of article 4 requires that where a law authorizing the contracting of a debt shall be submitted to the people, provision shall be made at the time for the payment of the interest, annually, as it shall accrue, by a tax levied for the purpose or from other sources of revenue, and that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted. It is argued that this requires two separate acts: one authorizing the debt, the other levying the tax. There is no basis for this argument. Since provision for the payment of interest must be made at the same time as provision for incurring the debt, the natural way would be to include both in one act; but whether contained in one act or not, the constitution requires all to be submitted to the people at the same time.

In connection with this last objection, and based upon the proposition that section 18 requires two acts,—one for incurring the debt, the other for levying the tax to pay the interest,—the argument is made that the statute violates

section 12 of article 4 of the constitution, which requires a ye and nay vote upon each bill separately upon the final passage. This section does not require a separate vote upon each section or provision of the bill. The bill may contain many provisions creating new rights and duties and so establishing new laws applicable to the conditions which are the subject of the enactment, but it is not necessary that each of these provisions be voted upon separately. For instance, section 4 of the Local Option law creates the crimes of forgery and perjury which may be committed in connection with the filing and verification of the petition for a vote, but the fact that a law for the creation of anti-saloon territory and a law creating a new criminal offense of forgery or perjury were included in the single enactment did not invalidate the act. *People v. McBride*, 234 Ill. 146.

The appellant contends that even if the act was constitutionally submitted and approved, its terms violate several provisions of the constitution. One of them is section 13 of article 4, in regard to the title which is set out in the beginning of this opinion. It is insisted that the act contracts a debt on behalf of the State, levies a tax for the payment of bonds, appropriates money from the State treasury, from the road fund created by the Motor Vehicle law and from other sources of revenue, and provides for making compensation to certain counties of the State, and that none of these subjects are expressed in the title. The title of an act is not intended to be an index of its contents. The object of the constitutional restriction is to prevent the inclusion in an act of provisions foreign to the subject of legislation, which have no legitimate tendency to accomplish the purpose of the act as expressed in the title. Provisions, however diverse, which tend to make effectual the purpose so expressed may be included in the act though not expressed in the title. *People v. McBride, supra*.

The main purpose of the act in question is the construction of a State-wide system of durable, hard-surfaced roads.

Incidental to that purpose, and necessarily connected with its accomplishment, is the means of payment, which the act provides, in accordance with its title, shall be by an issue of bonds by the State. The money arising from the sale of bonds must be paid into the State treasury, and under section 17 of article 4 of the constitution can only be drawn from the treasury in pursuance of an appropriation made by law. Before bonds can be sold it is necessary to make provision for their payment, and this can be done only by the levy of a tax for that purpose or from some other source of revenue. Therefore, in order to accomplish the purpose of the act and the construction of the roads to which it refers, it was proper, if not necessary, to include in it the appropriation of money, the issue of bonds and the levy of a tax for their payment. The act makes no appropriation of the road fund created by the Motor Vehicle law. Section 19 of that law directs that the fund shall, if and when the State shall incur any bonded indebtedness for the construction of permanent highways, be set aside and used for the purpose of paying and discharging, annually, the principal and interest on such bonded indebtedness then due and payable and for no other purpose. The act under consideration, in providing for the payment of the principal and interest of the bonds by a tax levied for the purpose or from other sources of revenue, as required by the constitution, has provided that the moneys in the road fund created by section 19 of the Motor Vehicle law shall first be appropriated to the payment of the principal and interest of the bonds, and only in case of a deficiency of that fund to pay the interest and bonds shall any tax be levied for that purpose in any year. The only means provided in the act for the payment of the cost of the roads is that mentioned in the title,—an issue of bonds,—to which is incidental the levy of a tax for the payment of them in case the funds already provided for that purpose prove insufficient.

The claim that the act violates section 2 of article 2 of the constitution by imposing upon the owners of motor vehicles and their property burdens not imposed upon the owners of other kinds of property, and in so doing also grants an immunity to owners of all other kinds of property, in violation of section 14 of article 2, fails, for the reason that the act neither imposes such burden nor grants any immunity. For the same reason the argument also fails that the act imposes upon the owners of motor vehicles the entire cost of the roads, and so violates section 1 of article 9 of the constitution, which requires the General Assembly to provide such revenue as may be needful by levying a tax by valuations, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. The Motor Vehicle law provides for the registration of motor vehicles and requires every owner of a motor vehicle to pay a fee to the State, annually, but the amount, time and manner of such payment are in no way affected by the act now under consideration.

Section 10 of the act provides that the department of public works and buildings may make use, in the construction of the roads, of any paved road of a proper, durable, hard-surfaced type which may have been constructed by any county and the State, or by the county alone and accepted by the State, and in such case an amount of money equal to the share of the actual cost of such paved road paid by the county shall be allotted to the county, to be used, at the option of the county, either in the payment of any bonds issued by the county and used to improve its State-aid roads, or in the improvement of its State-aid roads by the construction thereon of a durable, hard-surfaced road under the direction and to the satisfaction of the department of public works and buildings. The objection is made that this section is an assumption of the debts of the counties whose roads are so used and discharges their inhabitants from their proportionate share of the State taxes, and so

violates section 20 of article 4 and section 6 of article 9 of the constitution. Section 10 merely provides for the payment by the State of the cost of a road of which it takes control as a part of the State-wide system. The State assumes no debt but pays in cash for what it purchases, and the county may use the money to construct or improve its other roads, or, at its option, in the payment of its bonds issued to improve its State-aid roads. The taxes of the inhabitants of the county for the construction of a State-wide system of roads will not be affected in any way. The county will merely be paid for the cost it has paid for the road taken.

The appellant contends that the appropriation of sixty million dollars, to be derived from the sale of the bonds, violates section 16 of article 5 of the constitution, because it fails to specify the objects and purposes for which the appropriation is made, appropriating to such objects and purposes, respectively, their several amounts in distinct items and sections. The appellant does not indicate the several objects and purposes for which the several amounts should be appropriated in distinct items and sections. The act requires all contracts for construction to be let to the lowest responsible bidder. It authorizes the department of public works and buildings to purchase and supply any labor, tools, machinery, supplies and material needed for the work, to make all final decisions affecting the work and all regulations it may deem necessary for the proper management and conduct of the work and for carrying out all the provisions of the act to the best interest and advantage of the people of the State. The single purpose for which the money appropriated is to be used is the construction of the system of roads. There will, perhaps, be many contracts for the construction of parts of the roads, but each contract is not an item which can be separately stated and for which a definite amount can be appropriated. There will, perhaps, be many contracts for the purchase of ma-

terial and tools, but each contract of purchase is not an item which can be separately stated and for which a definite amount can be appropriated. Nor is the purchase of all of one kind of material such an item. All are items of the aggregate, but the constitution does not require an itemization, in minute detail, of every expenditure of money in connection with the general purpose for which an appropriation is made. The legislature could not know at the time of making the appropriation, even approximately, the amount required for each of the various contracts or purchases. A similar objection was made to three acts appropriating sums of money in gross for "building and maintaining State-aid roads," in *Martens v. Brady*, 264 Ill. 178, and was held invalid. The original section 16 of article 5 made no special reference to appropriations. So much of the section as now refers to bills making appropriations of money was adopted as an amendment in 1884. At the next session after the adoption of this amendment the legislature made an appropriation of \$200,000 for the purchase of a site and constructing buildings thereon for the soldiers' and sailors' home and for fitting the same for occupancy, without separating the amount into items. (Laws of 1885, p. 16.) The same legislature made a similar appropriation of \$73,000 for the construction and completion of the main building of the Eastern Illinois Hospital for the Insane, (Laws of 1885, p. 13,) and numerous other like appropriations. It has been the customary, if not the uniform, method of making appropriations for the construction of buildings and other public works, and the Supreme Court building was constructed and the Centennial Memorial building is in process of construction by means of appropriations so made. (Laws of 1895, p. 76; Laws of 1907, p. 74; Laws of 1917, p. 66.) This legislative construction, while not obligatory upon the court, is entitled to consideration and we regard it as according with the constitution.

The contention is made that the act violates the prohibition of section 22 of article 4 of the constitution against local or special laws for laying out, opening, altering and working roads or highways, and that it delegates legislative and judicial powers to the department of public works and buildings, in violation of article 3. Subject to constitutional limitation the control of the legislature over the public highways is absolute, and it may give jurisdiction over them to such authorities as it may see fit and change the control of them at pleasure. (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; *Illinois Malleable Iron Co. v. Lincoln Park Comrs.* 263 id. 446.) By general laws it has delegated to municipal authorities of cities and villages, to park commissioners, to the commissioners of highways of towns and counties, as governmental agencies, certain authority and control over highways. By the present act it changes this authority and control, so far as the highways coming within its terms are concerned, and brings them under the authority and control of another governmental agency,—the department of public works and buildings. The act is not local, for, while it does not include all the highways in the State, it does provide a system of highways affording reasonable connection with one another to practically all parts of the State. The basis upon which the location of the routes established by the act was made is declared to be the connection with each other of the different communities and the principal cities of the State. It is not argued, and cannot well be after a consideration of the routes established, that this basis has been disregarded. A substantially similar basis of classification of roads was held reasonable in *Martens v. Brady*, *supra*, and it was also held that the objection that the statute was local because only a part of the roads in the State would be brought under its provisions was untenable.

There is no delegation of either legislative or judicial power to the department of public works and buildings.

It is true that many questions,—the material to be used, the width of the roadways, the character of the construction and the plans and specifications therefor, the terms and conditions of contracts, the acceptance or rejection of work done, and the numberless details in carrying out the provisions of the act,—are left to the determination of the department of public works and buildings, which is authorized and required to make all final decisions. The decision of such questions is ministerial. Legislative power is the power to enact laws or declare what the law shall be. (*People v. Roth*, 249 Ill. 532.) Judicial power is the power which adjudicates upon the rights of citizens and to that end construes and applies the law. (*Owners of Lands v. People*, 113 Ill. 296.) Assessors and boards of review in valuing property for taxation, clerks of courts and sheriffs in taking and approving bonds, city councils in granting or revoking licenses to keep dram-shops, superintendents of schools in granting or revoking teachers' certificates, boards of examiners in granting and revoking licenses to practice medicine or pharmacy, fish commissioners in granting permits to take fish for propagation at times and by means otherwise prohibited, all exercise discretion and judgment in the performance of their duties, but they do not, while executing the law under which they act, make or declare, construe or apply any law, and the acts which, respectively, confer upon them the powers which they exercise do not delegate either legislative or judicial power. (*People v. Roth*, *supra*; *People v. Apfelbaum*, 251 Ill. 18.) The selection of the public highways to be affected is not left to the arbitrary discretion of the department, as the appellant's bill avers. It is true, as the bill alleges, that the act fixes the routes upon which the roads are to be constructed, in a general way, by naming the termini, which are in some cases hundreds of miles apart, with no direct public highway leading from one to the other and with many public highways intervening, and the power is delegated to the de-

partment of public works and buildings to determine the exact public highways between the termini upon which the roads shall be constructed. The determination is not, however, left to an arbitrary discretion. While the termini are the only points fixed by the statute, the roads are to be constructed between the termini substantially upon the routes described, so as to connect with each other the different communities and principal cities of the State, and so as to afford the different places named and the intervening communities reasonable connection with the termini and with each other.

We are of the opinion that the act is not subject to the constitutional objections made to it, and the decree of the circuit court is affirmed.

Decree affirmed.

(No. 12639.—Judgment affirmed.)

FREDERICK HEINZE *et al.* Plaintiffs in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(ANTONIA KRINGS, Defendant in Error.)

Opinion filed June 18, 1919.

1. WORKMEN'S COMPENSATION—*when injury arises out of employment.* If an employee is injured while in the performance of any of his duties the injury arises out of his employment.

2. SAME—*claim for compensation may be made orally by attorney.* The claim for compensation required by the Workmen's Compensation act to be made within six months after the accident may be made orally by the attorney for the claimant.

3. SAME—*claim against partners and award against the firm will bind individual partners.* A claim for compensation may be filed against certain named persons described as partners and an award be made against them by the same description, and the judgment of the circuit court confirming the award will bind the partners individually.

4. PARTNERSHIP—*a partnership is not a legal entity.* A partnership is not a legal entity separate and distinct from the persons composing it, and although the same parties are engaged in two different lines of business under different partnership names but conducted from the same office, there is, in law, but one firm.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

EDWARD L. ENGLAND, (SAMUEL J. NORDORF, of counsel,) for plaintiffs in error.

SHAEFFER & FOSTER, (GEORGE H. FOSTER, of counsel,) for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Antonia Krings filed an application on November 23, 1916, for an award under the Workmen's Compensation act on account of the death of her husband, Fred Krings, resulting from injuries alleged to have been received by him arising out of and in the course of his employment on June 7, 1916. Frederick G. Heinze and Ernest Weinsheimer, co-partners doing business as F. Heinze & Co., were named as defendants in the application. At the hearing before the arbitrator January 18, 1917, upon leave granted, the application was amended by adding as parties defendant Frederick Heinze and Ernest Weinsheimer, doing business as the Weinsheimer Teaming Company. The arbitrator dismissed as to Frederick Heinze and Ernest Weinsheimer, doing business as F. Heinze & Co., and entered an award against them as co-partners doing business as the Weinsheimer Teaming Company. The Industrial Commission confirmed the findings and award of the arbitrator, and plaintiffs in error sued out a writ of *certiorari* and took the record to the circuit court of Cook county. The award of the commission was affirmed, and the trial judge certified that the cause, in his opinion, is one proper to be reviewed by this court.

The deceased on the day of his injury was in the employ of plaintiffs in error, Frederick G. Heinze and Ernest Weinsheimer, as a teamster. Plaintiffs in error were en-

gaged in business as commission merchants and also had teams and wagons with which they did hauling for themselves and also for others. They operated as commission merchants under the firm name of F. Heinze & Co. They did their hauling for others under the firm name of Weinsheimer Teaming Company, kept the hauling account separate from the commission account, and paid all bills of the teaming department with checks drawn on the account of the Weinsheimer Teaming Company, except when there was no one present to sign checks, when payments would be made from the money drawer. Both lines of business were conducted from the same office, the same book-keeper kept the accounts for both, and the reason the two lines were carried on under different names was to obtain hauling from other commission merchants who on account of business jealousy would not give them the hauling if they knew F. Heinze & Co. were doing the teaming. The check to pay for the liability insurance covering teamsters and their helpers was drawn against the account of the Weinsheimer Teaming Company and signed F. Heinze. The teams were owned and the business carried on by plaintiffs in error and no one else was connected with them. It was the duty of the deceased, as a teamster for plaintiffs in error, to go to firms on South Water street, Chicago, and pick up business from customers. The injury from which his death resulted was caused by a fall in the doorway of G. W. Randall & Co., commission merchants, who were customers of plaintiffs in error's teaming department, on West South Water street. It was about noon when the deceased fell, having slipped on a runway at the door, having about a foot and a half incline to six feet in length. His knee-cap was fractured. He was taken to a hospital and medical aid was rendered by a physician of his own selection and later by another chosen by his wife. An infection of the knee made an operation necessary. General septicemia developed and the deceased died on July 12, 1916. Some time in Octo-

ber, 1916, Mrs. Krings and her attorney, George H. Foster, went to the business quarters of the plaintiffs in error, and the attorney told Heinze that they were making their claim against Frederick Heinze and Ernest Weinsheimer, doing business as F. Heinze & Co. and as Weinsheimer Teaming Company, or in whatever name they were doing business.

Plaintiffs in error's first contention is that the injury to and death of the deceased did not arise out of and in the course of his employment. This contention is without merit. It clearly appears that a part of the business of the deceased was to go to customers of his employers and pick up business; that Randall & Co. were such customers; that he was compelled to go through Randall & Co.'s building to reach Spahns, another customer of plaintiffs in error. The wagon and team that he was using had been left in the alley, and the reasonable inference to be drawn from the facts proven is in complete accord with Weinsheimer's testimony, "I suppose he went back there to see if he could get a load." The record in other striking particulars overthrows the contention made by the plaintiffs in error. J. A. Bloomington, the attorney representing the General Accident and Liability Insurance Company, stipulated on the hearing before the arbitrator that the injury arose out of and in the course of the employment, and E. C. Ferguson, since deceased, who was then representing plaintiffs in error, agreed to that stipulation and thereby bound plaintiffs in error. Weinsheimer also testified that deceased was in the course of his duties when he was hurt. The rule has been announced and frequently applied that if the employee is injured while in the performance of any of his duties such injury arises out of his employment. (*Mueller Construction Co. v. Industrial Board*, 283 Ill. 148.) The evidence fairly tends to show that the injury arose out of the employment, and the stipulations of their counsel and the admission of Weinsheimer estop plaintiffs in error from now contending otherwise.

It is next insisted that no claim for compensation was made in apt time. This contention is based upon the fact that the application against plaintiffs in error as the Weinsheimer Teaming Company was not made until January 18, 1917, more than six months after the injury and the date of the last payment of compensation, and that no claim had been made against them, as such teaming company, prior to that time. This contention is not supported by the record, but, on the contrary, is overcome by the positive testimony of attorney Foster, to the effect that he told Heinze that they were claiming against them as F. Heinze & Co., the Weinsheimer Teaming Company, or in whatever name they were doing business. The claim for compensation may be made orally, as in this case. (*Suburban Ice Co. v. Industrial Board*, 274 Ill. 630; *Moustgaard v. Industrial Com.* 287 id. 156.) The claim for compensation was against F. Heinze and Ernest Weinsheimer. A partnership is not a legal entity separate and distinct from the persons composing it; (*Abbott v. Anderson*, 265 Ill. 285;) and it makes no difference that the same parties are engaged in two different lines of business under different partnership names,—there is in law but one partnership. (*Campbell v. Colorado Coal and Iron Co.* 9 Colo. 60.) The claim filed against the partners, therefore, was a valid claim, and the words describing the character of business done by them are merely words *descriptio personæ* and surplusage. For the same reason the contention that the award of the commission and the judgment of the court are erroneous because not against Frederick G. Heinze and Ernest Weinsheimer individually cannot be sustained. The legal effect of the award and the judgment is to bind plaintiffs in error as individuals, and the addition of words *descriptio personæ* cannot be held to render an award and judgment erroneous.

For the reasons above stated the judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12674.—Judgment affirmed.)

FRANK MOLL, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(THE ILLINOIS CLAY PRODUCTS COMPANY, Defendant in Error.)

Opinion filed June 18, 1919.

WORKMEN'S COMPENSATION—*Compensation act does not apply to minors who are illegally employed.* By section 6 of the Child Labor act of 1897 it is illegal to employ any child under sixteen years in an extra-hazardous employment, and where such child is employed in an occupation declared to be extra-hazardous by the Workmen's Compensation act the employment is illegal and the act does not apply in case the child is injured in such employment.

WRIT OF ERROR to the Circuit Court of LaSalle county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

J. E. MALONE, JR., for plaintiff in error.

SONNENSCHN, BERKSON, LAUTMANN & LEVINSON, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Frank Moll was employed June 19, 1916, by Arthur Corbin, a farmer, to work on the farm at a wage of \$22 per month, with board and lodging. He did the ordinary farm work on Corbin's farm until August 16, 1916, when Corbin made a contract with the Illinois Clay Products Company to strip or remove the top surface of earth from a stratum of clay the Clay Products Company was mining and shipping to market. Moll was paid by Corbin the \$22 per month wages while he worked on the job at the Clay Products Company's mine and Corbin was paid by the company. The removal of the top surface from the clay was done under and in accordance with the directions of the Clay Products Company, with plows and scrapers furnished by the company. Moll began work at the company's mine

August 16, 1916, and continued to work there until September 19. Most of the time he was engaged in stripping earth from the clay, but occasionally, when directed by officers of the company to do so, did some other kind of work about the mine. While engaged in the work at the company's mine Moll lodged and boarded at Corbin's and performed chores there mornings and evenings. On the 19th of September, while driving a team hitched to a plow which Jones, president of the company, was riding to make it sink deeper in the ground, a chain attached to the whiffle-tree broke and the whiffle-tree flew back, striking Moll's right leg, breaking both bones above the ankle. A physician was called by the president of the company and Moll was removed to a hospital, where the fracture was set and where he could receive proper attention. He remained in the hospital until November 24, and claims he was totally disabled until the 10th of May following, and that there is a permanent partial disability. He made application for an award under the Workmen's Compensation act against the Clay Products Company. Moll was not sixteen years old at the time of his injury. He was born October 26, 1900, and was sixteen years old the 26th of October following his injury on the 19th of September. The arbitrator who heard the application denied it, and on review by the Industrial Commission that body affirmed the decision of the arbitrator. The cause was removed to the circuit court for review by *certiorari*. That court affirmed the decision of the Industrial Commission and certified the case was one proper to be reviewed by this court.

At the hearing before the arbitrator it was admitted defendant in error and its employees were under and subject to the Workmen's Compensation act, but it was and is denied that plaintiff in error was an employee of defendant in error, the claim being that he was the employee of an independent contractor. Liability to pay compensation was also denied on the further grounds that the employ-

ment of the plaintiff in error at the time of his injury was casual, and also because he was under sixteen years of age and was engaged in work he could not legally be employed to do.

Plaintiff in error contends (1) that he was an employee of defendant in error at the time of his injury; (2) that if he was not, then under section 31 of the Workmen's Compensation act defendant in error is liable because of its failure to require Corbin to insure his liability to pay compensation; (3) that the employment was not casual; (4) that the statute in force at the time of the injury did not prohibit plaintiff in error's employment in the work he was doing.

Plaintiff in error contends that the statute concerning the employment of child labor in force when the injury occurred did not make the employment of minors under sixteen years of age illegal in such industries as that of defendant in error; that prior to 1917 the statute enumerated a large number of employments in which children under sixteen were forbidden to be employed, and mills were not mentioned among the prohibited employments. By amendment in 1917 mills were specifically mentioned among the forbidden employments, and counsel says the word "mill" embraces defendant in error's plant and occupation, employment in which of minors under sixteen years of age was not illegal before 1917. Plaintiff in error insists that prior to 1917 there were a group of employments declared extra-hazardous by the Workmen's Compensation act not included in the occupations prohibited by the Child Labor act, and that this group embraced employment in the plant of defendant in error.

The act of 1897 to regulate the employment of children in Illinois (Laws of 1897, sec. 6, p. 91; Hurd's Stat. 1917, sec. 6, p. 1422,) reads: "No child under the age of sixteen years shall be employed, or permitted or suffered to work by any person, firm or corporation in this State at such

extra-hazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved."

Defendant in error is not under and subject to the Workmen's Compensation act by virtue of its election to provide compensation to its employees under the act but because it is engaged in an occupation declared to be extra-hazardous by section 3 of the statute. Paragraph 2 of section 5 of the Workmen's Compensation act provides that "minors who are legally permitted to work under the laws of the State" shall be considered the same and have the same rights as adults. It is immaterial to a decision of this case whether plaintiff in error is right or wrong in his contention that prior to 1917 the prohibition of sections 20c and 20j of the Child Labor act did not apply to the occupation and business of defendant in error. It was declared by legislative enactment to be an extra-hazardous business. (Workmen's Compensation act, sec. 3.) By section 6 of the Child Labor act above quoted it is made illegal to employ a child under sixteen years of age in any such employment. If plaintiff in error was an employee of defendant in error his employment was illegal, and the Workmen's Compensation act does not apply to minors who are illegally employed. (*Roszek v. Bauerle & Stark Co.* 282 Ill. 557; *Messmer v. Industrial Board*, id. 562.) As in our view this is a complete bar to an award under the Workmen's Compensation act in favor of plaintiff in error, it is unnecessary to decide the other questions raised and discussed in the briefs.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12547.—Reversed and remanded.)

MARGUERITE EICHHORN, Defendant in Error, vs. THE
ST. LOUIS AND O'FALLON COAL COMPANY, Plaintiff
in Error.

Opinion filed June 18, 1919.

1. MINES—*fact that dangerous condition was not marked does not conclusively show failure to comply with the Mining act.* A willful failure to comply with the Mining act means a conscious failure to perform a duty enjoined by the act, and the fact that a dangerous condition actually exists in a roof at the time of the visit of the mine examiner does not show a willful failure to comply with the act in not marking the place as dangerous; if the examiner made a proper examination and no dangerous condition was discoverable.

2. SAME—*statute contemplates a sufficient examination to discover dangerous conditions.* The provisions of the Mining act for the examination of mines contemplate a proper and sufficient examination to discover whether dangerous conditions exist, and if such an examination would have disclosed a dangerous condition, a jury is justified in concluding either that the examination was not made or that it did disclose the actual condition, notwithstanding the testimony of a mine examiner to the contrary.

3. SAME—*when testimony as to condition of roof some days before accident is not admissible.* The test for the admission of evidence is whether it tends to prove or disprove the fact in issue, and in an action for damages for the death of a miner occasioned by the fall of slate from a roof, where the material question is as to the condition of the roof when examined by the mine examiner on the day of the accident, the testimony of witnesses as to the condition of the slate some days before, when coal had not been blasted from under it, is not admissible, and the error in admitting such evidence is prejudicial where the testimony of other witnesses tends to prove a safe condition of the roof at the time of the examination.

4. SAME—*when proposition of law is properly refused.* In an action for damages for the death of a miner occasioned by the fall of slate from a roof in the mine, a proposition of law to the effect that if the roof appeared to be safe and solid at the time of its examination by the mine examiner with a sounding rod on the morning of the accident and was safe and solid after four boxes of coal had been taken out and within a short time before it fell the plaintiff could not recover is properly refused, where it ignores testimony of experienced miners that the slate was of a brittle nature and liable to fall at any time although it appeared to be solid.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding.

BARTHEL, FARMER & KLINGEL, for plaintiff in error.

WEBB & ZERWECK, and T. M. WEBB, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A writ of *certiorari* was allowed to bring to this court the record of the Appellate Court affirming a judgment recovered by Marguerite Eichhorn, defendant in error, in the circuit court of St. Clair county, against the St. Louis and O'Fallon Coal Company, plaintiff in error, for damages occasioned by the death of her husband, Louis Eichhorn, from an injury received in the mine of the plaintiff in error.

The amended declaration contained two counts, the first charging a willful failure to enter the working place of Louis Eichhorn and inspect the same and make a conspicuous mark thereat as notice to all men to keep out and to make a record of such condition in a book kept for that purpose; and the second charging a willful failure to observe the unsafe and dangerous roof in the working place and willfully failing and omitting to place a conspicuous mark or sign thereon as notice to all men to keep out. The defendant's plea was not guilty and the case was tried by the court without a jury.

In the coal mine of the defendant room 4 extended south from a stub-entry about 250 feet and was 37 feet wide. Room 3 was east of room 4 and parallel with it, and it was determined to open a cross-cut in the partition wall between the two rooms at the south end. The cross-cut was to be started from room 4 and to be between 21 and

23 feet in width. The vein of coal was 6½ feet thick, and above it there was a stratum of slate from 20 to 24 inches thick and above that a limestone roof. Several days before the accident the machine runners went into room 4 and under-cut the vein of coal in the space allotted for the cross-cut to a depth of about six feet. The shot-firers afterward went into the room and fired a shot near the center of the under-cutting about 18 inches from the top and blasted out the coal, leaving a V-shaped space in the center. The coal was cleaned up and removed, and on the day before the accident the shot-firers again went into the place and prepared and fired two shots,—one at the left and the other at the right of the center shot,—blasting out the space and leaving the coal piled up in the face of the cross-cut to within about two feet of the slate. After this was done the mine examiner at three o'clock in the morning of July 19, 1916, inspected the room and left his visitation mark on the left-hand side of the cross-cut and did not make any mark of a dangerous condition. At eight o'clock that morning Louis Eichhorn and his buddy, A. W. Dimmett, went into the room for the purpose of loading out the coal that was brought down by the two shots the day before. They loaded four coal cars with the coal that had been blasted out in the cross-cut, and while loading the fifth a piece of slate fell and so injured Eichhorn as to cause his death. The fall was triangular in shape, about six or eight feet in one direction and six or seven in the other.

There was no evidence tending to prove the charge in the first count of the declaration of a willful failure to enter the working place and inspect the same. It was proved and not disputed that the mine examiner went into the room and sounded the roof with the sounding rod which the statute requires a mine examiner to use, and his visitation mark appeared at the left of the cross-cut. In order to maintain her action it was essential that the plaintiff should prove two things: First, that a dangerous condition existed at

the time of the visit of the mine examiner; and second, that he willfully failed and omitted to make the mark required by the statute as a warning to all men to keep out. The Appellate Court, in effect, adopted a rule that if the first fact was proved the defendant could not excuse itself for a failure of the mine examiner to mark the place as dangerous by proving a proper examination and that no danger was discoverable by such an examination. Such a rule would substitute insurance against accidents in a mine in place of obedience to the requirements of the statute to make an examination to see whether dangerous conditions exist, and, if found, to mark the place. The statute imposes a liability for, and only for, a willful failure to comply with its terms, and to say that if a proper examination has been made and no dangerous condition was discoverable by such examination there has been a willful failure to make an examination and mark dangerous conditions would be to pervert language and confound all distinctions between the meaning of words. It will not be presumed that the court has intentionally adopted false reasoning leading to such a result. A willful failure to comply with the act, as used in the statute, means a conscious failure to perform a duty enjoined by the act. (*Catlett v. Young*, 143 Ill. 74; *Odin Coal Co. v. Denman*, 185 id. 413; *Donk Bros. Coal Co. v. Peton*, 192 id. 41; *Eldorado Coal Co. v. Swan*, 227 id. 586; *Davis v. Illinois Collieries Co.* 232 id. 284.) No question of good faith or bad faith, good intent or evil intent, is involved, but if there is a conscious failure to make the examination required by the statute or to mark a dangerous condition when found, the owner or operator of the mine is liable for any resulting injury.

The question under consideration came before the court in the case of *Mertens v. Southern Coal Co.* 235 Ill. 540, in which there was a slip in the roof on the evening of March 19, 1906, making the roof dangerous and liable to fall, and about eleven o'clock the next day a portion of the

roof fell and the plaintiff was severely and permanently injured. No mark had been placed in the room indicating the dangerous condition and no minute or report of the same was made by the mine examiner. It was contended that these facts did not show a willful violation of the statute, but it was held that the jury was justified in finding that there was a dangerous condition at the time of the examination and if the mine examiner had made a proper examination he must have discovered the dangerous condition, and therefore it was a fair inference that he did not examine the room, or if he did examine it and discovered the condition he failed to mark the same, and that in either case the failure to perform the duty was a conscious one. That case was cited and the opinion quoted from in *Peebles v. O'Gara Coal Co.* 239 Ill. 370, where it was held not necessary for the plaintiff to prove that the defendant had actually discovered the dangerous conditions complained of, and that operators of mines are liable not only when dangerous conditions have been discovered but also where a proper examination required by the statute would have discovered the existence of such conditions. These decisions state a correct rule, since any other would permit a mine examiner to make only a casual or insufficient examination and the operator excuse himself on the ground that some sort of examination was made. The law has not always been stated exactly in that way, but the facts of each case have brought it within the compass of the rule so stated.

In *Aetitus v. Spring Valley Coal Co.* 246 Ill. 32, the mine examiner testified that he examined the place where the mule stable was to be built and it was not dangerous, but this court thought the evidence tended to support the claim that the place was, in fact, dangerous. The court said the case was apparently tried by the defendant on the theory that good faith on the part of the owner or operator of the coal mine was a defense, but it was held that the owner or operator could not excuse himself in failing to properly

examine the mine and mark dangerous places therein which are known to him, on the ground that his examiner or manager in good faith thought the place was not dangerous. The law was stated as follows: "If the mine is in a dangerous condition and the owner or operator has failed, with knowledge of its condition, to comply with the statute he is liable, and he cannot excuse himself on the ground that he had the mine examined and in good faith thought it was not dangerous. His liability does not rest upon the ground that in good faith or bad faith he thought there was no danger in the mine, but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the conditions in the mine, he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril, and he cannot excuse himself because he or his examiner or manager may think the mine safe." The opinion in every part contained the qualification that the owner or operator has knowledge of the dangerous condition or is advised of such condition.

In *Cook v. Big Muddy-Carterville Mining Co.* 249 Ill. 41, the trial court had given an instruction that if the jury found that a dangerous condition existed in defendant's mine and such condition was known to the defendant or by the exercise of ordinary care might have been so known, then they might find the violation was willful. It was held that this instruction applied the rule of mere negligence to an action under the statute for a willful violation of its provisions, which requires something more than mere negligence. The court said: "If a dangerous condition exists in a working place in a mine, the mine examiner has no authority to determine that the place is not dangerous contrary to the fact, and the mine owner cannot excuse himself for a failure to mark the place on that ground,"—citing *Eldorado Coal Co. v. Swan*, *supra*. It was held that the in-

struction removed all distinctions between negligence and willfulness, contrary to the plain language of the statute.

In *Piazzi v. Kerens-Donnewald Coal Co.* 262 Ill. 30, a clod attached to the roof at the side of a cross-cut fell, causing an injury, and the mine examiner testified that he saw the clod both before and after it fell; that a clod, when it becomes exposed and is not supported, is liable to fall in a certain length of time, and that a clod is treacherous and apt to fall. He said that he examined the clod and sounded it with his rod, but the evidence justified a conclusion that the appearance and condition of the clod showed to the mine examiner that it was dangerous. The duty to make an examination is enjoined by law, which contemplates a proper and sufficient examination to discover whether dangerous conditions exist, and if such an examination would have disclosed a dangerous condition, a jury is justified in concluding either that the examination was not made or that it disclosed the actual condition, notwithstanding the testimony of a mine examiner to the contrary.

To prove the existence of a dangerous condition in the roof of the mine the plaintiff examined as a witness A. W. Dimmett, the "buddy," who was the only person there during the forenoon of the day of the accident. He testified that they went into the room about eight o'clock in the morning and looked at the roof, and there was some loose slate in the southeast corner of the room, which they took down; that they tested the slate with the mine picks used in mining coal and it sounded solid. He did not remember how often they tested the slate, but he sounded the roof on his side two or three times or more. He did not know how many times Eichhorn sounded the roof, but when he sounded it he said it was all right. They tested the roof, after loading four boxes, before loading the last one, and it fell while loading that car. The material question was the condition of the roof when examined by the mine examiner, and the testimony of Dimmett was relevant to that

question. The test for the admission of evidence is whether it tends to prove or disprove the fact in issue, and the court permitted the plaintiff, against the objection of the defendant, to prove by witnesses the condition of the roof in the room some days before the accident and when the solid vein of-coal was in place supporting the slate which fell. These witnesses testified to conditions of the slate along the east rib or partition between the rooms when the body of the slate which fell could not be seen but was imbedded in the cross-cut over the coal, and they testified about slate extending beyond the partition wall at the southeast corner, where the loose slate was taken down by Eichhorn and Dimmett before they began work and therefore was not the cause of the injury. This testimony did not tend to prove the condition of the roof and slate when examined by the mine examiner under changed conditions, some days afterward. In view of the testimony of the mine examiner and Dimmett tending to prove a safe condition at the time of the examination, the error in admitting this testimony was prejudicial.

The defendant submitted two propositions of law which were refused by the court, the substance of which was, that if the mine examiner examined the working place and it appeared from such examination, made by a sounding rod, to be safe and solid, and if it was solid and safe after four boxes of coal had been loaded up and within a short time before the slate fell, the plaintiff could not recover. There was evidence for the plaintiff by men experienced in mining that the slate was brittle and of a kind, character and composition which is liable to fall at any time without notice, although it appeared to be solid; that sometimes loose slate of that kind would fall after the coal had been taken out and sometimes it would not; that this was what was called "rotten" slate, which might stay up for some time or fall without warning, and that there was always danger of its falling. The propositions of law both stated that if the hypothesis of fact existed plaintiff could not recover, and

the court did not err in refusing them, because they ignored the evidence which tended to prove that the examination showed a condition of the roof where the slate, although solid, was liable to fall at any time and therefore the condition was dangerous.

The judgments of the Appellate Court and the circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

(No. 12708.—Decree modified and affirmed.)

EDMUND M. DUNNE, Catholic Bishop, Appellee, vs. THE
COUNTY OF ROCK ISLAND *et al.* Appellants.

Opinion filed June 6, 1919.

INJUNCTION—*when county may be compelled to remove building erected during pendency of suit.* In a proceeding to enjoin a county from erecting a jail building within 200 feet of a school, a decree for perpetual injunction may order the county to remove any part of the building constructed during the pendency of the suit.

APPEAL from the Circuit Court of Rock Island county;
the Hon. W. T. CHURCH, Judge, presiding.

C. J. SEARLE, for appellants.

JAMES F. MURPHY, and KENWORTHY, DIETZ, SHALLBERG, HARPER & SINNETT, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On June 21, 1915, the appellant, Edmund M. Dunne, Catholic Bishop, filed in the circuit court of Rock Island county his bill alleging that the public square in the city of Rock Island had been dedicated to public use, to be open and free from encroachments of any kind, and praying for an injunction restraining the county of Rock Island from erecting a jail thereon, to the irreparable injury of

his property fronting and abutting on the square. Upon a hearing of a motion for a temporary injunction the motion was contested by affidavits without any plea or answer to the bill, and the motion was denied and the bill dismissed. An appeal was prosecuted to this court, and the decree was reversed on the grounds that the bill on its face stated a good cause of action and affidavits could not be heard on the motion. The court stated the law to be that the words "public square" written on the map clearly indicated that the square was dedicated as a public square, to be used by the public for some public purpose, but the words did not indicate any certain or definite use of the square, and the purpose might be shown by proof of custom or long usage. The cause was remanded, with directions that the parties be required to make up issues in the case by proper pleadings for a final hearing. After the filing of the bill the General Assembly passed an act approved June 24, 1915, providing that it should be unlawful to build a jail within 200 feet of any building used exclusively for school purposes, and the complainant contended that he was entitled to insist upon the provisions of that statute, but his claim was not sustained for want of allegations in the bill that his school building was used exclusively for school purposes and that the jail would be within 200 feet of the school building. (*Dunne v. County of Rock Island*, 273 Ill. 53.) After the case was re-instated in the circuit court the bill was amended by adding averments that the school building was used exclusively for school purposes and that the contemplated jail building when erected would be within 96 feet of the complainant's building. The prayer for an injunction was amended so as to bring it within the purview of the act, and prayed for an injunction against constructing the jail building on any part of the public square, and particularly within 200 feet of the school building. The answer denied that the dedication was for use as a public square free from buildings or encroachments of any

kind or that complainant's building was used exclusively for school purposes, and alleged the invalidity of the act as violating provisions of the constitution. The issues were referred to the master in chancery to take the evidence and report the same with his conclusions. The cause was heard on exceptions to his report, and the amended bill was dismissed for want of equity and a second appeal was prosecuted from that decree. The complainant had based his right to an injunction upon two different and distinct grounds, and by the amendment had only sought to restrain the erection of a jail within 200 feet of his building. If that relief should be granted the prayer of his bill would be satisfied and the further claim necessarily abandoned. This court said that if the issue of fact as to the use of the building was found in favor of the complainant and the act prohibiting the erection of a jail within 200 feet of a building used exclusively for school purposes was not unconstitutional, the other questions raised concerning rights claimed under the original bill were eliminated. The court considered the evidence and found those issues in favor of the complainant, and the decree was reversed and the cause remanded to the circuit court, with directions to grant the relief prayed for in the bill. (*Dunne v. County of Rock Island*, 283 Ill. 628.) There was not only no decision concerning the power or right of the county to erect a jail on the public square more than 200 feet from the complainant's building, but it was stated that no such question was considered. The only questions were whether the complainant's building was used for school purposes and whether the act was a valid and lawful exercise of the police power, and these questions having been resolved in favor of the complainant, the circuit court was directed to grant the relief which the court had said the complainant was entitled to under the facts and law. The cause was again re-instated in the circuit court, and a decree was entered enjoining and restraining the county "from locating, building and con-

structing and thereafter maintaining said jail building on any part of the said public square, and particularly within 200 feet of said building of the complainant so used exclusively for school purposes."

A reading of the opinion of this court stating what relief the complainant was entitled to under the facts and law in connection with the mandate would show that an injunction against erecting a jail at any place on the public square not within 200 feet of the complainant's building was not within the meaning or intent of the direction given, because no question of that kind was considered or decided.

The decree also found that since the institution of the suit, and while it was pending, the county had partially erected a jail building on the public square within 200 feet of the school building, and it was ordered to remove all such parts or portions of the jail building so erected during the pendency of the suit. The only office of a temporary injunction is to preserve the status until a final hearing, and upon such a hearing, if a perpetual injunction is ordered, the defendant may be required to restore the status. (*Lambert v. Alcorn*, 144 Ill. 313; *Turney v. Shriver*, 269 id. 164; *Gulick v. Hamilton*, 287 id. 367.) An injunction against the erection of a jail building within 200 feet of the complainant's building having been awarded, the complainant had a right to have any part of the building constructed while the suit was pending removed by the county.

The decree is modified by striking out the words "any part of" and the words "and particularly," and as so modified the decree is affirmed.

Decree modified and affirmed.

Mr. JUSTICE THOMPSON having been State's attorney for the county of Rock Island throughout this litigation took no part in this decision.

(No. 12369.—Reversed and remanded.)

JOHN NOVAK, Defendant in Error, *vs.* JOHANNA KRUSE,
Plaintiff in Error.

Opinion filed June 18, 1919.

1. MORTGAGES—*proof that absolute deed is a mortgage must be clear.* The burden of proving that a deed absolute on its face was in fact a mortgage is upon the one making the averment, and such proof must be clear and convincing.

2. SAME—*when grantee is not entitled to be subrogated to benefit of trust deed.* Where a quit-claim deed is taken in satisfaction of a bond and trust deed for money loaned by a building association and the association subsequently conveys the property by warranty deed and releases the trust deed the lien is extinguished, and the grantee in the warranty deed is not entitled to be subrogated to the benefit of the trust deed.

3. SAME—*what grantee must show before being entitled to be subrogated to benefit of a trust deed.* Before a grantee can be subrogated to the benefit of a trust deed against property he has acquired by warranty deed he must have paid or assumed the payment of the bond secured by the trust deed as a part of the consideration for his deed or advanced the money to pay the bond pursuant to an agreement that the trust deed shall be held as security therefor.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding.

POULTON, GREEN & MERRICK, for plaintiff in error.

EDWARD J. NOVAK, and FRANK H. NOVAK, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The Appellate Court for the First District affirmed a decree of the superior court of Cook county entered in a suit in chancery brought by the defendant in error against

plaintiff in error and others to revive and foreclose a released mortgage and remove alleged clouds from the title to certain land. The cause is brought to this court from the Appellate Court by petition for *certiorari*.

The bill of complaint made John V. Ayers, Johanna Kruse and others defendants. After issues joined, the cause was referred to a special commissioner, who recommended that a decree be entered in accordance with the prayer of the bill of complaint, pursuant to which the chancellor entered the decree in question, embodying the findings of fact of the special commissioner.

The essential facts necessary to the issues involved as they appear from the greater weight of the testimony are, that on January 15, 1900, John V. Ayers, being at that time the owner of the land in question with other real estate not involved in this case, executed a trust deed to John G. Panoch, as trustee for the Bohemian-American Building and Loan Association, to secure the payment of his bond of that date in the principal sum of \$4000, payable to the order of the association. Edward J. Novak was named in the trust deed as successor in trust. This trust deed was acknowledged on said date and duly recorded in the trust deed records of said county on January 17, 1900. A quit-claim deed was also executed on the same date as the trust deed by Ayers to the association conveying the land in question to the association. Ayers defaulted in his payments on the bond and the association recorded the quit-claim deed on May 8, 1900. Immediately upon recording the deed the association took possession of the land in question and completed the building of certain structures then being constructed upon the land and expended in the aggregate about \$1800 in completing the buildings. After the completion of the buildings the association leased the property and collected the rent, insured the buildings and exercised the usual powers of ownership until July 22, 1902. The association being in financial stress, on that date sold and conveyed

the property to James Novak for John Novak, defendant in error, for the consideration of \$4200, of which \$1000 was paid in cash and the remainder by receipts for money paid in by John Novak on stock subscription in the association. By its deed the association covenanted that the property was clear and free from all incumbrance. On July 25, 1902, the association executed a release of the trust deed in question. The bond and trust deed were not assigned. On January 30, 1900, Alva Johnson and Charles N. Whitehead recovered a judgment for \$91.84 against Ayers, upon which an execution was duly issued. On November 5, 1900, Theodore N. Bell secured a money judgment for \$432.50 and costs against Ayers by virtue of section 13 of the Mechanic's Lien act of Illinois, which provided that in the event the court found no right to a lien existed, recovery against the owner of the property could be had as at law. Said lien was filed against other property of Ayers and not against the property in question. Execution was duly issued upon the Johnson and Whitehead judgment and the premises were sold by the sheriff September 30, 1902, for \$130.38, and the sheriff issued his certificate of sale on that date, which was filed for record on October 2, 1902. The holder of the Bell decree redeemed from the sale on the Johnson and Whitehead judgment. The sheriff issued his certificate of redemption, and on the same day levied an execution on the Bell decree and judgment and issued a certificate therefor on January 26, 1904, from which there being no redemption, the sheriff issued his deed to Joseph P. Vesely on January 26, 1904, who later conveyed the lot in question to the plaintiff in error, Johanna Kruse. In July, 1902, the association was insolvent, and shortly after it went into liquidation and its affairs were wound up.

Defendant in error testified that he knew nothing concerning said bond or trust deed, and at the time of the alleged purchase understood that he was getting the lot free of incumbrance.

The release of the trust deed was executed by the president of the association, in which release it was recited that John G. Panoch, trustee, refused to release the trust deed, and that the release so executed by the president of the association was at the request of the board of directors of the association, pursuant to the statute in such cases provided. It is contended by the defendant in error and found by the chancellor that said release was inadvertently made and that it should not have been executed, the chancellor holding that the giving of the quit-claim deed and the recording thereof did not pass the title to the premises nor operate to extinguish the trust deed, and that therefore, when defendant in error took through his brother, James Novak, a warranty deed from the association he took only the rights of the association under the trust deed and became subrogated thereto, and that the debt under the bond and trust deed had never been paid.

On a review of the evidence we are convinced that the quit-claim deed was given by Ayers to the association with authority to record the same and take title to the property on default of payments under the bond, and that when the quit-claim deed was recorded the title passed to the association. It appears from the testimony of at least two witnesses who were shown to have been at that time connected with the association that such was the intention of the parties to the quit-claim deed. In addition, Ayers, who after the quit-claim deed was recorded abandoned the premises, in his answer to the bill herein alleges that such was the understanding. This is further borne out by the fact that the association for two years rented the premises, insured the buildings thereon and paid the taxes, all in its own name, and it recited in its warranty deed to James Novak and in the resolution of its board of directors that it owned the premises. This being the clear understanding of the parties to the deed, such must be the effect of the instrument. The burden of proving that a deed absolute on its face was in

fact a mortgage is upon the one making such averment. Such proof must be clear and convincing. *Deadman v. Yantis*, 230 Ill. 243; *Rasch v. Rasch*, 278 id. 261.

It is evident that the property was deeded by Ayers and taken by the association in payment of the bond and trust deed for money loaned. That being true, the transfer of the title to the property operated as a satisfaction and extinguishment of the bond and trust deed, and when the association released the trust deed it not only acted in accordance with the understanding of both parties to the bond and trust deed but did what it was in duty bound to do. It follows, that when the warranty deed was executed to James Novak for defendant in error, the bond and trust deed had been satisfied and extinguished and no longer existed as a lien against the premises.

By his bill the defendant in error seeks to be subrogated to the rights of the association under and by virtue of the bond and trust deed. But the bond and trust deed having been satisfied and extinguished, there were no rights remaining in the association to which he could be held to be subrogated, and the release of the trust deed, though made after the deed to James Novak, did not prejudice the rights of defendant in error, for the reason that he could acquire no rights under them. It is not even contended that he paid or assumed to pay any obligation of the bond of Ayers or any part thereof. The full value of the property was quoted to him at \$4200. This amount he paid by receiving full credit for \$3200 paid in by him on stock subscription and adding thereto the sum of \$1000. The bond and trust deed were not mentioned, he testifying that he had not at that time heard there ever had been such a transaction. Indeed, it is urged with some force by plaintiff in error that defendant in error in his purchase of the premises overreached other stockholders of the association, in that he was by the conveyance to him of lot 27 allowed to withdraw the full value of the money paid in by him

on stock in an insolvent association while others in the association desired to withdraw and could not.

In *Home Savings Bank v. Bierstadt*, 168 Ill. 618, on page 623, this court clearly defines the principle of subrogation in the following language: "Subrogation, as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases. (*Bishop v. O'Conner*, 69 Ill. 431; *Borders v. Hodges*, 154 id. 498.) While these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person. The right of subrogation which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, is what is termed legal subrogation and exists only where included within those classes. But in addition to this principle of legal subrogation there exists another principle, which is termed conventional subrogation, which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien.—*Coe v. Maryland Railway Co.* 31 N. J. Eq. 105; *Tyrrell v. Ward*, 102 Ill. 29; *Tradesmen's Ass'n v. Thompson*, 32 N. J. Eq. 133.

Before the complainant could have been held to be subrogated to the benefit of the trust deed of Ayers he must

have paid or assumed the payment of the bond of Ayers secured by the trust deed as a part of the consideration of the deed of the association to him or advanced the payment of the bond pursuant to an agreement that the trust deed should be held as security for the money so advanced. (*White v. Cannon*, 125 Ill. 412; *Tyrrell v. Ward*, *supra*; *Young v. Morgan*, 89 Ill. 199.) Even though the bond and trust deed had not been satisfied, still, the complainant not having paid or assumed the payment of the bond of Ayers as a part of the consideration of his deed from the association to him and not having advanced the payment of said bond pursuant to an agreement that the trust deed should be held as security for the money so advanced, would not be subrogated to any interest represented by the bond and trust deed. Defendant in error not having brought himself within the rule entitling him to subrogation, was in nowise prejudiced by the release of the trust deed in question.

Complainant in his bill, in support of his claim to subrogation to the rights of the association under the bond and trust deed, avers that the same are still in full force and effect, and that under that subrogation he is entitled to have paid to him the \$4000 represented by the bond and trust deed. In other words, he makes the interesting claim that having paid out no more than the unincumbered fee to the property is worth, he is now entitled to receive back the sum of \$4000 and interest from January 15, 1900, though he appears to have assumed no obligation under the bond and trust deed, and although Ayers, from whom he claims this amount, turned over the entire property to satisfy the indebtedness thereunder. In order to support this claim the bill pleads the legal conclusion that the warranty deed operated merely as an assignment of the bond, trust deed and quit-claim deed and not to pass title. No facts are averred to sustain such a position and none appear in evidence. The complainant in his testimony admitted that he did not even

know of the existence of such trust deed or bond or quit-claim deed at the time his deed was made and that he considered he was buying the lot free from all incumbrance, yet such is his claim made in his bill and the theory upon which the decree of the chancellor appears to be founded. Nowhere in his bill, however, does he claim to have acquired by his purchase anything other than the lien created by the bond and trust deed, which he asserts is a prior lien. Despite his statement in his testimony, his bill nowhere avers that he ever acquired the title to said property. Indeed, if he admits title in him and avers that he is the beneficial owner of the bond and trust deed, he must show that which this record does not contain to avoid the merging of the two estates. This, apparently, he does not desire. His bill is based wholly upon the theory that he stands subrogated to the rights of a holder of a trust deed who has a right to have the same foreclosed and to have a sale thereon. The bill prayed such a sale and the decree ordered it. The bill also prayed that the judgments herein referred to and deeds thereunder be set aside as clouds upon complainant's title. Since complainant is seeking subrogation to the bond and trust deed and foreclosure of them, and since the decree of the chancellor finding such subrogation and awarding such sale must be reversed, it is unnecessary to discuss the validity of said judgments. Under the theory upon which the defendant in error's bill is drawn it would be immaterial whether such judgments were valid, as under such theory his lien would have been a prior lien.

The judgment of the Appellate Court and the decree of the superior court are reversed and the cause remanded to the superior court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(No. 12713.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. R. R. FOSTER *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919.

1. CRIMINAL LAW—*when statements are inadmissible to corroborate testimony of witness.* Statements or declarations as to the act of a party or witness in corroboration of his theory of the case or any fact favorable to him, whether oral or in writing, are, as a general rule, inadmissible in evidence on his own behalf, except where they are a part of the *res gestæ* or made in the presence of the other party.

2. SAME—*when alleged stolen articles are admissible in evidence.* Where defendants are charged with burglarizing a store, articles of merchandise found the next morning upon a public highway which the burglars might have traveled in leaving town in an automobile are admissible in evidence.

3. SAME—*when jury may be allowed to separate during trial.* Unless sufficient cause is shown why the jury should be kept together, the trial court may exercise its discretion in allowing the jury to separate during the progress of the trial of a criminal case for less than a capital offense, provided the jury are properly instructed concerning their duties while separated.

4. SAME—*word "permitted" may be used in an instruction as to right of defendant to testify.* The word "permitted," used in an instruction stating that the "defendant is permitted to testify in his own behalf," is not misleading or erroneous.

5. SAME—*Supreme Court is not bound to search for errors.* It is no part of the duty of the Supreme Court to search for errors or of its own motion to enter upon an investigation in order to find material upon which to base a judgment of reversal.

6. SAME—*instructions may be given as modified, without being re-written.* Section 74 of the Practice act implies that written instructions may be given as modified, and while it is not good practice to modify instructions so that the portions attempted to be erased still remain legible, such modifications, if not misleading, will not reverse the case.

7. SAME—*indictment constitutes no evidence of guilt.* An indictment is merely an accusation or charge against the accused as brought by the grand jury and is not in itself evidence of guilt, but the State must show to the satisfaction of the jury, beyond a reasonable doubt, that the accused is guilty as charged.

8. SAME—*instructions should be read as a series—erasures.* Instructions should be read as a series, and in determining whether the jury were misled by the giving of an instruction containing a sentence stricken out with a pen but still legible, the instruction should be considered with other instructions on the same subject.

9. SAME—*when judgment of conviction will not be reversed on evidence.* Unless the Supreme Court is able to say, from a consideration of the whole testimony, that there is clearly a reasonable doubt of the guilt of the accused it will not interfere on the ground that the evidence does not support the verdict.

WRIT OF ERROR to the Circuit Court of Logan county;
the Hon. T. M. HARRIS, Judge, presiding.

EDMUND BURKE, and H. F. TRAPP, for plaintiffs in
error.

EDWARD J. BRUNDAGE, Attorney General, C. EVERETT
SMITH, State's Attorney, and FLOYD E. BRITTON, (McCORMICK & MURPHY, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

R. R. Foster, James Clinton and Albert Wehr were indicted by the grand jury of Logan county upon the charge of burglary and larceny. After a trial the jury returned a verdict finding them guilty as charged in the indictment, and they were sentenced to the Southern Illinois State Penitentiary for not less than one year nor more than twenty years, until discharged according to law. From that judgment this writ of error has been sued out.

L. Burchett & Son, a partnership, were general merchants in the town of New Holland, in the western part of Logan county. They handled groceries, clothing and furnishings for men and women, dry goods, boots and shoes, trunks, silverware, etc. On the evening of December 10, 1918, they closed and locked their store at about nine o'clock. Stuart Robinson, a clerk, arrived to open the store the next morning at six o'clock and discovered that

the building had been burglarized and a large quantity of merchandise taken. He found on the sidewalk near the side door of the store three iron bars which had been taken from a railroad car standing on the side-track of the Illinois Central Railroad Company about a block away, and the doors showed evidence of having been forced open by the use of these bars. Among the things taken from the building were a flat-top trunk, a basket containing three or four dozen eggs and several bars of butter wrapped in white paper. The Burchett store faces south on Lincoln street, and Mason street runs along its west side. Two blocks east of Mason street another street runs parallel thereto, having a closed or blind end at the railroad tracks, about a block south. Not far north of the closed end is located an establishment conducted by John Mangold where cement blocks were manufactured, and against the side of the building was a pile of the cement blocks. The tracks of an automobile could be recognized in Mason street, where the car had apparently been run up at right angles to the sidewalk on the west side of the store near the side door, which had been broken open. Mangold also found on the morning of December 11 tracks of an automobile in his cement yard, and on the face of the pile of cement blocks, up to which the tracks led, was a mark about forty inches from the ground, and there were marks on the blocks at two places lower down. The clerk, Robinson, also found in this cement yard early that morning some dry goods and ladies' hand-bags which contained the marks and tags of the firm. About six o'clock on the morning of December 11 plaintiffs in error Foster and Wehr came to the home of George Hobkirk, a farmer residing a few miles northeast of Williamsville, in Sangamon county, and asked to telephone, saying their truck had broken down up the road and they wanted to get some help. Foster talked to one Dawson, in Springfield, and asked him to send an auto to pull them in. The broken car was then at or near a road inter-

section about a quarter of a mile east of Hobkirk's house. It had a top and the curtains were down. Foster told Hobkirk and his son his name and mentioned people whom he knew, apparently making correct statements as to these matters. Hobkirk's home is about twenty miles northeast of Springfield and about the same distance southwest of Lincoln. Springfield is about forty miles southerly from New Holland. One of the witnesses for the State, Fred Knollenberg, driving on the east and west road connecting New Holland and Lincoln about seven o'clock in the morning of December 11 found some ladies' silk hose in the road. One Sample, a farmer, residing east of New Holland, found on the same morning, about three and a half miles south and east of New Holland, a piece of crepe de chine. Another witness, McCarthy, on the same morning, about 6:40 o'clock, found in the road several miles east of New Holland two pairs of gloves. Some of these articles had on them marks and tags of L. Burchett & Son. The point at which Knollenberg found the silk hose was some six or seven miles east of New Holland and almost due north of the place where plaintiffs in error were found on the morning of December 11, about six o'clock, in the road near the home of Hobkirk. Wehr was employed by Jacob Kauth, of Springfield, as a deliveryman for his grocery store, located in the extreme north end of Springfield. Wehr lived in the city and kept his employer's car at the place where he lived. Kauth had owned the car, an Overland fitted with a truck body, for some six months and had tried to run it in his delivery work but was unsuccessful and had several accidents, and therefore hired Wehr, who apparently was an experienced chauffeur, to run it for him.

Foster was the only one of the three plaintiffs in error who testified, and, with the exception of one other witness, was the only witness who testified as to the whereabouts of any of them on the night of December 10. Foster stated that on the evening of December 10 he made arrangements

with Wehr to meet him at 4:30 the next morning and go hunting rabbits when those animals got out into the road in the early morning; that he went to bed in his room about one o'clock and got up about four o'clock, went to the Ballard-Johnson Company's restaurant, in Springfield, where he had previously made arrangements with Farnback, the man in charge, to have a lunch ready for himself and party at 4:30; that about that hour he called for the lunch, which was prepared, and took it with him in a basket and put it into the car when he met Wehr. The evidence is not clear as to where Clinton joined them, but evidently it was in Springfield. Farnback testified that Foster called for this lunch about 4:30 on the morning of December 11. Foster stated that after the three people were in the car they drove north to Williamsville and went about a mile north of the place where their car later broke down, near Hobkirk's farm, and then, because Wehr wanted to get back to Springfield in time to go to work that day, they decided not to go any farther and turned around and started south. He testified they were no nearer New Holland at any time on the night in question than a short distance from where the car was broken; that they had no merchandise of any kind in the car and no basket except the one containing the eggs and sandwiches for their lunch; that there was nothing in the rear of the car at the time it was broken except a common box and a lap-robe, upon which Clinton was sitting. Foster further testified they had shot but one rabbit before the car broke down.

When Foster went to Hobkirk's house and telephoned Dawson to send a truck out to haul them into town, Dawson promised to do so. Dawson had formerly been in the saloon business in Springfield and was then running a soft drink place and apparently had nothing to do directly with the auto business. He, however, called up Charles L. Adams, manager of a transfer company in Springfield, and asked him to send a truck out to the Hobkirk place and

get the axle of a broken car. Adams directed one of his employees, Louis Newman, to go to the Hobkirk farm and bring in the broken axle. Newman, in a Ford car, went from Springfield about seven o'clock in the morning of December 11, pursuant to the directions given by Adams, through Sherman and Williamsville to the home of Hobkirk and was there directed to the truck in question. He found it in the middle of the north and south road, headed south, near a road intersection. Wehr was walking up and down the road and Foster got out of the car, telling Newman that the car was broken. There was another man lying down in the truck, immediately back of the seat, on something with a flat top, extending across the truck apparently next to the seat and about three inches above it. The truck had side curtains extending from the windshield to the rear and had a rear curtain, all of which were down. It had one seat and the tool-box was under the seat. Newman had occasion to use a wrench from the tool-box and held the curtain up, and also held the seat while one of the plaintiffs in error procured the wrench. He testified that while doing this he saw a market basket in front of the seat upon the floor of the car which contained three or four dozen eggs, and that the same basket contained three or four bricks of butter wrapped in white paper. He also testified that the box or trunk the man was lying on in the car was covered with a lap-robe or black cloth, which also covered the contents of the car back of where the man was lying, and that the top of the thing that the man was lying on was two or three feet above the sides of the car; that the top of the contents of the car back of that extended about a foot above the sides of the car; that he could not see what the contents of the car were under the black covering. Newman further testified that when he went out to where the car was, he understood from the instructions given him that he was to bring in a broken axle and not to bring in the car, and that when he was informed that

he was to haul the car in, stated that he could not do it with the Ford truck, as it was not big or strong enough, and that therefore he soon started back to Springfield. Foster rode with Newman as far as Williamsville, where he left the car and Newman proceeded to Springfield. Newman testified that he saw Foster, as he got out of the car, put a revolver in his pocket.

Foster boarded a Chicago and Alton train that pulled into the station at Williamsville soon after he got out of Newman's car and went on to Springfield and to the garage of Harry Kutscher, where he made arrangements with Kutscher to haul in the crippled car. In accordance with this arrangement Kutscher drove a truck out to the car, arriving shortly before twelve o'clock, Foster accompanying him, and he hauled the car to Springfield, arriving there about one o'clock. On the return to Springfield Foster rode with Kutscher and Wehr and Clinton rode in the disabled car. Foster directed Kutscher to leave the car in the alley between Washington and Jefferson streets and Eighth and Ninth streets in Springfield, which was very near the place then run by Dawson. When Kutscher got out to the Hobkirk farm the curtains of the disabled car were all down and Clinton was in the car. At 10:30 on the evening of December 11, upon the order of Wehr, Kutscher's firm removed the truck from the alley to their garage and it was there repaired. On December 13, on the order of a member of the Springfield police force, the car was taken to a garage next door to the police station in Springfield, where it was later examined by Oscar Burchett, one of the Burchett firm, and John Mangold, manager of the cement yard. They found that the car at the rear end showed scars, scratches and abrasions, with particles of cement at points corresponding in a general way, in distance from the ground, to the marks on the cement blocks in Mangold's cement yard at New Holland. The testimony tends to show that Foster, although according to his testimony he had no

interest in the car other than that he had been riding in it, gave all directions and instructions concerning bringing in the car from the place where it was disabled and as to where it should be left in the alley across from Dawson's place of business, and that Wehr, although according to Foster's testimony he was in charge of the car, gave practically no directions or instructions whatever concerning the hauling in of the car or its disposition after they reached Springfield; that the first order he gave was at 10:30 on the evening of December 11, when he ordered the car taken to Kutscher's garage for repairs. The testimony also tends to show by practically every witness who saw the car in its disabled condition while near Hobkirk's farm, that the curtains were drawn down all around it all the time, and that Clinton, whenever he was seen, was in the car. We find no direct evidence in the record as to the whereabouts of Wehr and Clinton on the night of December 10 prior to 4:30 the next morning, when Foster testified he went with them in the car from Springfield to Hobkirk's farm.

When the manager of the Springfield restaurant, Farnback, testified that he sold plaintiff in error Foster a lunch and delivered it to him on the morning of December 11, counsel for plaintiffs in error attempted to introduce a written report or sheet of sales which Farnback testified he had kept on the night in question. This report did not show to whom the sales were made but only the date and amount. The court refused to admit it in evidence. The report did not show or tend to show in any way whether Foster was in the restaurant on the morning in question. It does tend to show that Farnback was there, but that is not disputed. If this report was admissible for any purpose it was for the purpose of corroborating Farnback's testimony. Statements or declarations as to the act of a party or witness in corroboration of his theory of the case or any fact favorable to him, whether oral or in writing, are, as a general rule, inadmissible in evidence on his own behalf except

where they are a part of the *res gesta* or made in the presence of the other party. (1 Ency. of Evidence, 383; Jones on Evidence,—2d ed.—secs. 235, 236.) This report was, in its nature, self-serving, and we cannot see what bearing it would have on any of the material issues of the case. It was rightly excluded.

Counsel for plaintiffs in error also argue that certain goods alleged to have been taken from the Burchett store and found thereafter on the public highways were improperly admitted in evidence, as they were not sufficiently identified and were not found on the direct road between New Holland and Springfield. There was testimony in the record to the effect that a portion of the direct road immediately south of New Holland to Springfield was in a bad state of repair on the night in question, and these goods were found scattered along the highway running east from New Holland to the north and south road upon which the disabled auto was found in the possession of plaintiffs in error. We think the articles were sufficiently identified to be admitted in evidence for what they were worth. All the evidence was before the jury, and they could judge whether or not the articles were any of the stolen goods and also to show the route the burglars had taken with the stolen goods. We see no error in their introduction.

It is urged, also, in this connection by counsel for plaintiffs in error that it was error to admit the testimony as to the measurements and condition of the car at the police station in Springfield without in some way requiring evidence to connect that car with plaintiffs in error, and without, as we understand the argument, more definite evidence as to the markings upon the rear of the car in connection with the scratches or markings upon the cement blocks in Mangold's cement yard. The testimony as to the car that was examined by Mangold, the manager of the cement yard, sufficiently identified it as the car used by plaintiffs in error, the markings on the car and the cement blocks.

Counsel for plaintiffs in error also urge that the trial court committed error in permitting the jury to separate during the recesses of the court while the trial was going on. No question of this nature was raised before the verdict of the jury was received. Furthermore, the law is settled in this State that the trial court may exercise its discretion in allowing the jury to separate during the progress of a trial in a criminal case less than capital unless sufficient cause is shown at the trial why the jury should be kept together, the trial court properly instructing them concerning their duties while separated. (*People v. Stowers*, 254 Ill. 588; *Sutton v. People*, 145 id. 279.) The record shows that the jury were properly instructed by the trial court before they were allowed to separate. On this record the court did not commit error in so allowing them to separate.

Counsel for plaintiffs in error earnestly argue that the trial court erred in giving the second instruction for the People. This instruction deals with the credibility of a defendant in a criminal case. The objection of counsel for plaintiffs in error is to the wording of one of the sentences, to the effect that "the jury are not bound to accept of the defendant's statements upon the witness stand as to the truth." We do not see that there is any substantial difference between telling the jury that they are not bound to believe the testimony of the defendant and telling them that they are not bound to accept his statements as to the truth. It is also strenuously insisted by counsel that the first sentence of the instruction is wrong because it contains the word "permitted" or "permission" in a clause which stated that "defendant is permitted to testify in his own behalf, but by such permission, under the statute," etc. The word "permitted" or "permission" was used in similar instructions which were held rightly given in *Hirschman v. People*, 101 Ill. 568, *Rider v. People*, 110 id. 10, and *Padfield v. People*, 146 id. 660. The identical instruction so complained of

was given on behalf of the State in *People v. Turner*, 265 Ill. 594, as the record in that case shows although it is not shown in the opinion. While all of the criticisms made in the briefs in this case were not there passed upon by the court, the instruction in that case was held not misleading or erroneous. While it might be held that the wording of the instruction in question might be improved upon, we do not think it misled the jury in any of the particulars claimed by counsel for plaintiffs in error. The reasoning of this court in *People v. Turner*, *supra*, *Padfield v. People*, *supra*, and *People v. Duzan*, 272 Ill. 478, fully answers the criticism of counsel as to the misleading character of this instruction.

Counsel for plaintiffs in error further argue that the court erred in refusing instructions "C," "H" and "I" asked on behalf of plaintiffs in error. So far as these refused instructions stated correct principles of law they were covered by other instructions given on behalf of plaintiffs in error.

Counsel further argue that the court erred in giving the instructions as to the form of the verdict, in that such instructions were in such form that the jury would understand they could not find some of the plaintiffs in error guilty and others not guilty. So far as we can ascertain from the record, no request was made by plaintiffs in error to give any instruction clearly stating that one could be convicted and the others not. Furthermore, we cannot see how the jury were misled or any of the plaintiffs in error were injured because of the failure to give such an instruction. Under the undisputed facts in this record, if one of the plaintiffs in error was guilty all were guilty, and if one was not guilty the other two were not.

The trial court was asked on the part of plaintiffs in error to give instruction 7, which reads:

"The court instructs you that the indictment in this case is no evidence of guilt and should not be so considered by

the jury. And no juror should permit himself to be influenced against the defendants because of the fact that an indictment had been returned against them nor because of the nature of the charge made in the indictment."

As given to the jury this instruction had the last sentence entirely stricken out by pen lines drawn horizontally through each line of said sentence, but the lines were so erased that the sentence could still be read and understood by the jury. The first sentence was given without any erasure. It is argued by counsel for plaintiffs in error that this last sentence was so stricken out with a pen by the court, and this seems to be conceded by counsel for the State, although there is nothing in the record to indicate whether the court or counsel erased the last sentence in said instruction. It is most strenuously insisted that the giving of this instruction so modified with this erasure would mislead the jury by causing them to believe that while the indictment is not evidence, still there would be nothing improper in permitting themselves to be influenced by the fact that plaintiffs in error had been indicted and were charged with being burglars. Counsel for plaintiffs in error state that the practice of striking out words in instructions and permitting them to go to the jury in such condition that the words stricken out may be read has often been condemned by this court. However, they cite no authority in support of this statement. We have frequently held that it is no part of our duty to search for errors or enter upon an independent investigation of the court's own motion in order to find material upon which to base a judgment of reversal. (*Wickes v. Walden*, 228 Ill. 56, and cases there cited.) While counsel have not pointed out and cited authorities in support of this position we have investigated the point in question. Section 74 of the Practice act (Hurd's Stat. 1917, p. 2244,) in its wording seems plainly to imply that written instructions may be given as modified. Indeed, the only practical way, under this stat-

ute, to avoid this, would be for the trial judge to re-write every instruction that he wished to modify in any way, and with the numerous instructions that are frequently asked by counsel in criminal as well as civil cases, the practice of re-writing all modified instructions by the trial judge would be found very difficult, if not impossible. Somewhat similar questions have been raised in other cases in this court, and so far as we are advised a case has never been reversed solely because the instruction had been handed to the jury as modified by inserting or striking out and without being re-written. (See *Manrose v. Parker*, 90 Ill. 581; *Union Railway and Transit Co. v. Kallagher*, 114 id. 325; *Cobb Chocolate Co. v. Knudson*, 207 id. 452; *Leighton v. Chicago Traction Co.* 235 id. 283.) While we do not approve of the practice of modifying instructions so that the portions attempted to be erased still remain legible, manifestly any modification of this kind not necessarily misleading ought not to reverse the case. So long, however, as the laws of this State require all instructions to be in writing when given to the jury, we cannot see how the practice of modifying instructions by the court by erasing a portion and perhaps inserting something in the place of the erased portion and leaving the erased portion in the instruction, in some cases possibly legible, can be prevented in all cases. The erased sentence was a repetition of the same thought that was stated in the first sentence that was left in the instruction unerased and given to the jury.

The doctrine attempted to be set out in this instruction, as originally presented, was, in substance, very similar to the rule frequently stated as to the legal presumption of innocence as to the accused party until his guilt is established beyond a reasonable doubt by competent evidence, and the instruction as modified still was intended to convey something of the same idea. There can be no question that an indictment is merely an accusation or charge against the accused as brought by the grand jury, and is not, in itself,

evidence that the accused is guilty of the crime charged but that the State must still show to the satisfaction of the jury, beyond a reasonable doubt, that the accused is guilty as charged. (*Padfield v. People, supra*; 10 R. C. L. 871, and cases cited in notes 10 to 14, inclusive; Jones on Evidence,—2d ed.—sec. 12.) This rule that the accused must be given the benefit of this presumption of innocence until the jury finally agree upon the verdict was covered by several instructions given on behalf of plaintiffs in error. The instruction given for them immediately preceding the modified instruction complained of, set forth that it was the duty of the jury “to presume the defendants [naming them] not guilty in this case. That it is your duty to give the defendants the benefit of this presumption throughout the trial of the case and when you shall have retired to consider of your verdict. The presumption of innocence attends the accused at every stage of the proceedings until the jury agree upon a verdict. And further, it is the duty of the jury to explain the evidence against the defendants upon the hypothesis or theory that the defendants were not present in New Holland at the time of the commission of the crime charged in the indictment and did not commit such crime, if you can reasonably and consistently do so in the light of the whole evidence.” Again, instruction 11 given on their behalf instructed the jury that the defendants were not required to prove their innocence but that the prosecution must prove their guilt of the identical crime charged, in manner and form as charged in the indictment, beyond all reasonable doubt, or else they should be found not guilty. Other instructions given on behalf of plaintiffs in error covered, directly or indirectly, the doctrine of the presumption of innocence and that the accused must be proven guilty beyond all reasonable doubt in order to convict them. It has been repeatedly stated by this court that instructions should be read as a series. Assuming for the purposes of this case that instruction 7 as originally pro-

posed, without any modification, stated correct principles of law, and assuming, also, that the jury understood that the court had modified the instruction by striking out with a pen the last sentence, still we do not see, in view of all the evidence in the case, read in the light of the instructions given along with this modified instruction, how the jury could have been misled in any way to the injury of the plaintiffs in error, or any one of them, by the modification so made. Taking all the instructions together, along with this modified instruction, we think the jury would necessarily understand that the indictment was not evidence, and that the accused must be presumed to be innocent until they were proven guilty by the evidence in the record, beyond all reasonable doubt.

Counsel for plaintiffs in error argue at length that on this record there is clearly a reasonable doubt as to the guilt of their clients; that this court has frequently held that it will not hesitate to reverse a judgment of conviction in a criminal case where the evidence on which it is based is of an unsatisfactory character, (*Keller v. People*, 204 Ill. 604; *Newman v. People*, 223 id. 324; *People v. Martellaro*, 281 id. 300;) or where the conviction was probably due to prejudicial or incompetent evidence. (*Mooney v. People*, 111 Ill. 388; *Campbell v. People*, 159 id. 9; *Waters v. People*, 172 id. 367.) We adhere to the reasoning laid down in the decisions just cited, but we do not think that the reasoning applies on the record in this case. This case, while largely depending upon circumstantial evidence, was one in which it was peculiarly within the province of the jury to say whether or not the circumstances so proven showed that the plaintiffs in error were guilty beyond a reasonable doubt. Instruction 9 given for plaintiffs in error told the jury that if it was possible to account for the facts and circumstances proven by the prosecution upon any reasonable theory other than the guilt of the defendants, consistent with the evidence in the case, then it was the duty

of the jurors to so account for it and find the defendants not guilty. The theory of counsel for plaintiffs in error on the trial of the case before the jury and here is, that plaintiffs in error went out on the morning of December 11, at 4:30 o'clock, to hunt rabbits as they jumped in and out of the road, while counsel for defendant in error ridicule the idea that anyone should from an auto hunt rabbits as they were jumping in and out of the road in the early morning, and urge that the jury evidently did not believe the story of Foster in this regard. There is no question about the store being burglarized on the night in question and certain goods taken, and that the burglars were not familiar with New Holland streets and its surroundings or they would not have driven the car into the blind street, which necessitated their going into Mangold's cement yard and turning around. Furthermore, there can be no question that the burglars, whoever they were, traveled east on the road from New Holland towards Lincoln as far as the north and south road upon which the broken car of plaintiffs in error was seen in the early morning of December 11, adjoining Hobkirk's farm. Chauffeur Newman, who was sent out in a Ford car to give them assistance, testified positively that he saw in a market basket in the car which was in the possession of plaintiffs in error, several dozen eggs and some butter bricks. Eggs and butter bricks had been taken from the burglarized store.

Counsel for the plaintiffs in error seem to concede that Newman's testimony, if true, tends strongly to show the guilt of plaintiffs in error, but they argue that he had very little opportunity to see into the car, and may have been mistaken both as to the eggs and as to the contents of the car back of the seat and the box or thing upon which Clinton was lying, and that the testimony of Foster as to the lunch, as corroborated by the testimony of Farnback, accounted for this basket. It may be said in this connection that there was no testimony by Farnback that in any way

described the basket in which the lunch was taken away or identified it with the market basket in the car in question.

Counsel for the State also argue that the story of Foster that they turned around in the road about a mile north of where the broken car was found, next to Hobkirk's farm, because Wehr was desirous of getting back to Springfield to work by eight o'clock, is most unreasonable in view of the actions of plaintiffs in error at the time and after the car was broken; that if Wehr was so desirous of getting back to Springfield to work at eight o'clock he would not have waited around the car and allowed Foster to do all the arranging about getting the broken car in but would have endeavored to get back to Springfield at once on the interurban or the Alton railroad from Williamsville; that if they were on an innocent errand, such as hunting rabbits, the broken car would have been taken at once to the garage where it was ordinarily kept, instead of leaving it in the alley across the street from Dawson's, to whom Foster had first telephoned for a relief car; that there was no reason, if they were on an innocent mission, why they should not have attempted to get relief from a garage in Williamsville. Foster testified he did attempt to get relief from a garage owner in Williamsville and was told by the garage owner that he did not have any auto fitted for that work. There is testimony tending to show that there was only one garage at the time in Williamsville, and the owner testified that no one had applied to him for any relief such as Foster testified to.

The jury heard and saw the witnesses. In cases where the evidence is conflicting, depending upon the credibility of opposing witnesses, the finding of the jury can be regarded as conclusive unless it is reasonably clear that an error has been committed. It is only where the court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused that it will interfere on the ground

that the evidence does not support the verdict. (*People v. Grosenheider*, 266 Ill. 324, and cases cited.) The witnesses testified on all the conflicting matters before the jury, and the question as to whether or not Foster, or any of the other witnesses, told the truth was primarily one for the jury to pass upon. We cannot say that the evidence does not support the verdict.

We find no reversible error in the record, and the judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 12626.—Decree affirmed.)

IRA D. WILSON, Appellee, vs. WILLIAM HARROLD *et al.*
Appellants.

Opinion filed June 18, 1919.

1. TRUSTS—*trust will fail where equitable and legal estates are in same person.* A trust will fail where the equitable and legal estates are in the same person, as a person cannot be both a trustee and a beneficiary, and a trusteeship cannot be predicated of one who holds for life, only, or for his or her sole use and benefit. (*Hagan v. Varney*, 147 Ill. 281, distinguished.)

2. SAME—*rule in Shelley's case applies to trust estates.* Where a limitation in a deed is subject to the rule in *Shelley's case* the rule will be applied whether the limitation is of an equitable or legal estate.

3. DEEDS—*the rule in Shelley's case must control although contrary to grantor's intention.* Where the rule in *Shelley's case* is applicable to a limitation in a deed the rule must control and vest a fee simple, even though the intention of the grantor is shown clearly by the instrument to have been otherwise.

4. SAME—*the rule in Shelley's case applies to grant to "lawful heirs."* The qualifying adjective "lawful" before the word "heirs" in a deed does not in any way change the meaning of the word "heirs" to one of purchase rather than of limitation and does not prevent the application of the rule in *Shelley's case*.

5. SAME—*in construing deed, written part controls printed matter.* If there is a conflict in a deed between the printed part and the part written in, the writing will control in construing the deed.

6. SAME—when words in a deed may be considered as surplusage. Where the grantor in a deed has intermingled unnecessary and meaningless words with words of conveyance, or added other language after the words of conveyance which only serve to confuse, cut down or to destroy the known legal estates conveyed by proper words used, such superfluous matter may be disregarded.

7. SAME—what description of heirs may be disregarded in applying the rule in *Shelley's case*. The printed words "of DeWitt county and State of Illinois," following the word "heirs" in a deed, do not sufficiently describe the heirs so as to prevent the application of the rule in *Shelley's case*, where it is clear those words refer merely to the place of residence of the grantee.

APPEAL from the Circuit Court of DeWitt county; the Hon. GEORGE A. SENTEL, Judge, presiding.

GEORGE J. SMITH, for appellants.

HERRICK & HERRICK, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed by appellee in the circuit court of DeWitt county to quiet the title to twenty acres of land and for the construction of a certain deed. After the pleadings were settled the cause was referred to a master, who found that Charley Harrold took a fee simple title to said premises through a deed from Presley Williams and wife; that the trust estate created by said deed failed and that therefore the rule in *Shelley's case* applied in the construction of the deed, and that appellants here had no right, title or interest in and to said land. A decree was entered overruling the exceptions to the master's report and a finding was entered in accordance with said report. From that decree this appeal has been perfected.

Presley Williams was the owner of said twenty acres and on January 7, 1895, executed, with his wife, the deed in question. After the usual opening, naming the grantors and their residence, the deed continues: "For and in consideration of love and affection and five (\$5) dollars in

hand paid, convey and warrant to Charley Harrold in trust during his natural life and at his death to his lawful heirs, it being expressly understood that but a life estate is hereby deeded to said Charley Harrold, and that he cannot make a good title by deed or other conveyance but is to have the use of the land to be conveyed, only, and is to hold it absolutely in trust for his lawful heirs of DeWitt county and State of Illinois, the following described real estate, to-wit: [describing it.] Hereby reserving the control of said land and the right to collect, have, hold and use the rents and profits of said land to said Presley Williams for and during his natural life; and it is hereby agreed and expressly understood by and between all the parties to this instrument that the title to and in the above described land does not pass from said grantors, Presley Williams and Jemimah Williams, to the said Charley Harrold in trust as above until the death of the said Presley Williams, but at his death the title in said lands in trust is to pass to the said Charley Harrold, but only in trust, it being the intention of the said grantor to reserve and hold a life estate in the above described land to and for the said Presley Williams."

The record shows that Presley Williams departed this life testate August 13, 1898, and his estate was duly probated; that Charley Harrold had born to him in lawful marriage three children, who are the appellants herein; that on May 4, 1912, Harrold and his wife conveyed and warranted to Ira D. Wilson, appellee herein, for a consideration of \$1500, the fee simple title in said twenty acres of land by deed, which was duly filed for record.

Counsel for the appellants argues that Charley Harrold took a life estate, only, in the deed from Mr. and Mrs. Williams and that his three children took the fee under the designation of "his lawful heirs," contained in said deed; that whether this is true or not, the deed should be so construed as to exclude the rule in *Shelley's case* from apply-

ing thereto; that it was plainly the intention of the grantors that Harrold should only take a life estate. Counsel for appellee argue that Charley Harrold took a fee simple title under said deed; that as there was no legal separation of the legal and equitable estates in the conveyance to Harrold, there was a merger of the estates in him as sole trustee and beneficiary of the life estate, and therefore the rule in *Shelley's case* applies to the remainder conveyed to the "lawful heirs" and Harrold took title to the entire fee.

The first question to be considered is whether the attempt of Presley Williams and wife to create by their deed a trust in Charley Harrold failed. It has frequently been stated by the authorities that a person cannot both be a trustee and a beneficiary; that "this doctrine results from that of merger of estates rather than from any incompatibility of interest between the trustee and *cestui que trust*. It is undoubtedly true that the same person cannot be at the same time sole trustee and sole beneficiary of the same identical interest; but a *cestui que trust* is not absolutely prohibited from occupying the relation of trustee for his own benefit, and especially is this so when he is but one of several trustees, or where he is a trustee for himself and others." (39 Cyc. 248, and authorities there cited; see, also, 28 Am. & Eng. Ency. of Law,—2d ed.—955; 1 Perry on Trusts,—6th ed.—sec. 347, note (a), in which are cited, among other authorities, the decisions of this court in *Burbach v. Burbach*, 217 Ill. 547, and *Spengler v. Kuhn*, 212 id. 186.) In Perry on Trusts (vol. 1, 3d ed. sec. 13,) that author states: "No person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpoena against himself. Therefore, if an equitable estate and a legal estate meet in the same person the trust or confidence is extinguished, for the equitable estate merges in the legal estate." This court has held that the trusteeship cannot be predicated of one who holds for life, only, and for his or her sole use and benefit. (*Dick v. Ricker*, 222 Ill. 413.) In

Thompson v. Adams, 205 Ill. 552, this court in construing a will said (p. 556): "No trust is created by this will. The widow is to have the sole use and benefit of the real and personal property so long as she lives and remains unmarried, and upon her death or re-marriage possession and the title in fee simple will unite at once in the same persons. The provision of the will creating her a trustee is therefore inoperative. 'A trusteeship cannot be predicated of one who holds for life, only, and for his or her own sole use and benefit, and the instrument which gives the life estate also gives the remainder to others in their own right, and no duty other than those that grow out of their legal relation is imposed upon the life tenant.' (*Schaefer v. Schaefer*, 141 Ill. 337.) The rights, duties and obligations of the widow under this will, so long as she remains unmarried, are those of a life tenant, only. The words used for the purpose of creating a trust may be rejected as surplusage."

These three decisions by this court can in no way be distinguished, on the facts or the law, from the case before us, and therefore the rule laid down in those cases must control here. It may be true that recent authorities are holding more liberally, and the courts are becoming more and more inclined towards carrying out the intention of the grantor or testator in regard to trusts, rather than attempting to defeat the intention by the application of strict rules as to merger or otherwise, as was said in *Irving v. Irving*, 47 N. Y. Supp. 1052, in accordance with the reasoning in *Lewin on Trusts*, (11th ed. 914,) but the rules laid down by this court must govern in matters of this kind rather than the reasoning in other jurisdictions.

Counsel for appellants relies on the reasoning of this court in *Hagan v. Varney*, 147 Ill. 281, as tending to uphold his argument that a trust was here created. The wording of the instrument there construed is entirely different from that in this case, and is different from the

wording of the instruments construed in the three cases in this court heretofore cited. If there is anything in that decision contrary to the conclusion here reached that no trust was created, it must be held that such reasoning was overruled, in effect, by the opinions of this court in *Schaefer v. Schaefer*, *supra*, *Thompson v. Adams*, *supra*, and *Dick v. Ricker*, *supra*. The case of *Fowler v. Black*, 136 Ill. 363, tends also to support the same conclusion.

Counsel for appellants further argues that even though the trust has failed the rule in *Shelley's case* will not apply and merge the fee in Harrold, for the reason, as we understand the argument, that this rule does not apply to trust estates. We find no authorities supporting this argument. In Perry on Trusts (vol. 1, 6th ed. sec. 358,) this question is discussed, and the author says, among other things: "As trusts are wholly independent of tenure they ought not to be affected by the rule, and a few cases have seemed to indicate that they were withdrawn from the operation of it; but it is now established that the same rule shall apply to the same limitation, whether it is of an equitable or a legal estate,"—citing numerous authorities, all apparently upholding the doctrine of the text, and this seems to be the general conclusion reached by the authorities. It is, however, stated by some writers that the rule does not apply to executory trusts, using the word "executory" in a limited sense; that all trusts which are not dry or passive are executory in some sense, but that a trust, to be subject to the rule, must be such a one that its limitations are left to the court to frame, the writing only giving general directions to guide the court in finding what estate is created. For a full discussion of this doctrine see Lewin on Trusts, (11th ed.) pp. 120-130, incl.; 1 Perry on Trusts, (6th ed.) sec. 359; Tiedeman on Real Property, (3d ed.) sec. 322, note 16. So far as we are advised, this court has always assumed that the rule in *Shelley's case* applied to trust estates. See *Bennett v. Bennett*, 217 Ill. 434; *Lord v. Com-*

stock, 240 id. 492; *McFall v. Kirkpatrick*, 236 id. 281; *Harvey v. Ballard*, 252 id. 57; *Carpenter v. Hubbard*, 263 id. 571; *Nowlan v. Nowlan*, 272 id. 526.

There being no trust estate created, the instrument granted a legal life estate to Charley Harrold with remainder to his heirs. "If an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate." (*Bails v. Davis*, 241 Ill. 536.) This instrument, therefore, in granting the legal life estate to Harrold and the remainder to his heirs, brings the wording squarely within the rule in *Shelley's case*, and therefore a fee simple was vested in Harrold. *Winter v. Dibble*, 251 Ill. 200, *Deemer v. Kessinger*, 206 id. 57, *Ætna Life Ins. Co. v. Hoppin*, 249 id. 406, and *Fowler v. Black*, *supra*, all tend to support this conclusion. This rule must control even though the intention of the grantor is shown clearly by the instrument to have been otherwise.

Counsel for appellants argues that the above rule should not apply because the instrument, instead of leaving the remainder simply to the heirs of Harrold, left it to his "lawful heirs." The qualifying adjective "lawful" before the word "heirs" does not in any way change the meaning of the word "heirs" to one of purchase rather than a word of limitation. *Deemer v. Kessinger*, *supra*; *Webbe v. Webbe*, 234 Ill. 442; *Stisser v. Stisser*, 235 id. 207; see, also, *Pease v. Davis*, 225 id. 408.

It is further argued by counsel for appellants that the rule should not apply because the instrument not only provides that the land shall go to the lawful heirs of Harrold, but still further particularizes by saying that it should go to "his lawful heirs of DeWitt county and State of Illinois," and that these words as used can still be said to make a particular description of the heirs the same as if the instrument had used the word "children;" that if the word "heirs" is

used as meaning "issue" or "children," then the rule in *Shelley's case* would not apply. (*Butler v. Huestis*, 68 Ill. 594; *Dick v. Ricker*, *supra*; *Stisser v. Stisser*, *supra*.) Apparently the original deed from Presley Williams and wife to Charley Harrold was drawn upon a printed form, and the proper erasures were not made in preparing the deed so as to erase the words "DeWitt county and State of Illinois," and these words referred to the place of the residence of the grantee and have no relation to the word "heirs." They form no part of the words of the conveyance and are really surplusage. Counsel for appellants does not deny that these words were a part of the printed form and that this explanation might be a reasonable one as to how they came to be in this instrument. Counsel for appellee argue that no sane man would limit an estate to his heirs of DeWitt county, only; that in the course of nature, affection and love for his donees he would follow rules of consanguinity and not geographical maps or municipal boundaries. If there is any conflict in a deed between a printed part and the part written in, the written part will control in construing it. (*Miller v. Mowers*, 227 Ill. 392, and cases there cited.) When the grantor in the instrument has intermingled unnecessary and meaningless words with words of conveyance and adds other language after the words of conveyance which only serve to confuse, cut down or destroy the known legal estates conveyed by proper words used, then all superfluous and surplusage matter may be cut out and disregarded. (13 Cyc. 619; 8 R. C. L. 1038, 1044.) The words "of DeWitt county and State of Illinois" are no part of the grantor's description of the estate granted. This being so the rule in *Shelley's case* applies, and the decree rightly held that the fee simple title was conveyed by this deed and vested in Charley Harrold.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(No. 12542.—Reversed and remanded.)

THE OTIS ELEVATOR COMPANY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(ERNEST J. WAYNER, Defendant in Error.)

Opinion filed June 18, 1919.

1. CONSTRUCTION—*in construing a statute the legislative intention should be sought and given effect.* The purpose of construing a statute is to find and give effect to the legislative intention where that can be done without contravening established rules of law, and in seeking for such intention the court should consider not only the entire act and the language used but also the evil to be remedied and the object to be attained, when such can be gathered from the act.

2. WORKMEN'S COMPENSATION—*purpose of paragraph (d) of section 8 of Compensation act.* Paragraph (d) of section 8 of the Workmen's Compensation act, giving an injured employee who returns to his employment incapacitated, eighteen months in which to file his claim for compensation, is an exception to the general provision for notice in section 24 and is intended to prevent any advantage being taken of the employee by reason of the relation re-assumed with his employer.

3. SAME—*paragraph (d) of section 8 of Compensation act can not apply where employee makes no claim and does not return to work within six months.* Paragraph (d) of section 8 of the Workmen's Compensation act, construed with section 24, cannot apply to an employee who does not return to his former services within six months after the injury or after the cessation of payments and who does not within that time make claim for compensation.

4. SAME—*injured employee may claim benefit of paragraph (d) of section 8 of the Compensation act although discharged within eighteen months after returning to work.* Paragraph (d) of section 8 of the Workmen's Compensation act, giving an injured employee who returns to his employment incapacitated, eighteen months in which to file a claim for compensation, cannot be construed to apply only to those who remain in their former employment for a period of eighteen months.

5. SAME—*paragraph (d) of section 8 of Compensation act does not deny equal protection of the law.* Paragraph (d) of section 8 of the Workmen's Compensation act, giving an injured employee who returns to his employment incapacitated, eighteen months in which to file a claim for compensation, while those who do not re-

turn are required to file their claims within six months under section 24, does not deny equal protection of the law, as the circumstances of the employee who does not return to his employment are not the same as those where the employee does return.

6. SAME—the circuit court, on review by *certiorari*, cannot enter a money judgment and order execution. The only authority which the circuit court has on a review by *certiorari* of the decision of the Industrial Commission confirming an award is to affirm the finding and the award of the commission or to set the same aside and enter such a decision as is justified by law or remand the cause, and there is no authority for entering a money judgment and ordering execution, as the claimant for the award is amply protected by the bond required of the employer on the petition for review.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

JOHN CLARK BAKER, for plaintiff in error.

WILLIAM R. JORDAN, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Cook county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error, Ernest J. Wayner, for injuries received by him while in the employment of the plaintiff in error.

The material facts in the case are stipulated by counsel for the respective parties in interest, to the effect that both parties were under the Workmen's Compensation act and subject to its provisions and that the injury on August 11, 1913, arose out of and in the course of the employment; that Wayner was under total disability, on account of said injury, from August 11, 1913, until March 15, 1914, at which time he returned to work for the plaintiff in error and continued to work thereafter for six weeks, at which time he was discharged; that compensation as provided by said act was paid by the plaintiff in error for such disability to March 15, 1914; that after Wayner's return to work he was unfit and unable to perform his usual services

and for that reason was directed to do other kinds of work during said six weeks; that at the end of the six weeks following March 15, 1914, Wayner had not fully recovered. Formal claim for compensation was filed with the Industrial Commission July 23, 1915, which date is within eighteen months after Wayner's return to work for his original employer, the plaintiff in error. An award was made by the arbitrator in his favor in the sum of \$1500 for a period of total and a period of partial disability, which was confirmed, on review, by the Industrial Commission. The circuit court of Cook county on *certiorari* affirmed the award, entered judgment therefor and directed the issuance of an execution for its enforcement.

It is contended by plaintiff in error that the claim for compensation having been filed more than six months subsequent to the last payment of compensation, is barred by the limitation of the Workmen's Compensation act; that the claimant was not continuously in the employment of the plaintiff in error for eighteen months subsequent to his return to work, and therefore the limitation provision of the statute is not applicable under the facts in this case; that the circuit court erred in entering judgment on the award and directing that execution issue thereon. It is contended by the defendant in error, Ernest J. Wayner, that having returned to work for the original employer, even though at a different kind of work, the provisions of paragraph (d) of section 8 of the Workmen's Compensation act apply to this case although claimant did not continuously remain in the employment for the period of eighteen months subsequent to such return.

It is urged by plaintiff in error in support of his first contention that the legislature intended by paragraph (d) of section 8 of the Workmen's Compensation act that the limitation of eighteen months for filing claim where the employee has returned to the service of the employer by whom he was employed at the time of the injury, should apply

only to those cases where the employee remained in the employment of said employer during the period of eighteen months, and in the event of his leaving such employment within that time that claim for compensation must be filed within six months from the date on which he left such employment, contending that under such circumstances section 24 of the act should apply. Section 24, in so far as it refers to said question, is as follows: "No proceedings for compensation under this act shall be maintained unless notice of the accident has been given the employer as soon as practicable, but not later than thirty days after the accident. In cases of mental incapacity of the employee, notice must be given within six months after such accident. No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. Notice of the accident shall in substance apprise the employer of the claim of compensation made and shall state the name and address of the employee injured, the approximate date and place of the accident, if known, and in simple language the cause thereof, which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: *Provided*, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice-principal in the enterprise. No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased."

Paragraph (d) of section 8, in so far as it applies to the question here, reads as follows: "In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act: *Provided*, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

Plaintiff in error contends that if a strict construction be given to the words, "in the event the employee returns to the employment of the employer in whose service he was injured," it would follow that such employee might return in five years and still have eighteen months thereafter in which to make claim and start proceedings, and that if such construction be given to paragraph (d) it becomes unconstitutional, as denying equal protection of the laws by making an arbitrary distinction between an employee who returns to the employment with his former employer and an employee who does not return to said employment, by giving the former eighteen months in which to file his claim while the latter has but six months; that such distinction is not based on any real difference in the circumstances.

It is a fundamental rule of construction of statutes that the intention of the legislature is to be sought and to be given effect where that can be done without contravening established rules of law; that the intention is to be gathered from the entire act when all its parts are construed together, and from the necessity or reason for the enactment when such can be gathered from the act. As was said in the case of *People v. Harrison*, 191 Ill. 257: "In determining the meaning of a statute the court will have regard to existing circumstances or contemporaneous conditions, and also to the objects sought to be obtained by the statute and the necessity or want of necessity for its adoption." The purpose of construction is to find and give effect to such in-

tention, and in seeking for such intention we are to consider not only the language used by the legislature, but also the event to be remedied and the object to be obtained. *People v. Flynn*, 265 Ill. 414; *Maiss v. Metropolitan Amusement Ass'n*, 241 id. 177.

An examination of paragraph (d) of section 8, together with section 24, discloses that said paragraph is made an exception to the general provision in section 24, it being the evident intention of the legislature to avoid any advantage being taken of the employee by reason of the relation re-assumed with his former employer. In making this exception the legislature has fixed the period of limitation for filing claims at eighteen months. Counsel for plaintiff in error urges that this period is unreasonable, for the reasons, first, that the employee may have advantage of this provision even though he does not return to employment for a period of five years; and second, because it gives to such employee a protection not given to one who does not return to such service. The first objection is untenable, for the reason that under section 24 the employee who does not return to his former service must file his claim for compensation within six months where no payments have been made or within six months after the last payment. It cannot be said that paragraph (d) should be held to apply to an employee who had neither returned to work nor made claim for compensation within six months after his injury or after cessation of payments. In other words, the employee who does not return to his former service within a period of six months after the injury or after the cessation of payments, and who does not within said period or periods make claim for compensation, can claim no benefit under paragraph (d), as he has by such failure to make claim for compensation waived all right thereto.

Counsel for plaintiff in error also contends that in the computation of time paragraph (d) is to be construed as applying only to those employees who remain in their for-

mer employment for a period of eighteen months, and that in case they cease to be so employed within that time their claims must be filed within six months of the date on which such employment ceased. In the first place, such a construction would be doing violence to the plain language of the act by reading into it a limitation of six months under certain conditions, neither limitation nor condition being contained or referred to in the act. As was said in *Wangler Boiler Works v. Industrial Com.* 287 Ill. 118: "Courts have no power to put a limitation upon a right legally given by the legislature, unless by a fair construction of the act it can be said such limitation was in furtherance of legislative intent." To construe paragraph (d) as limiting the right of the employee to a period of six months in which to file claim for compensation in case of his return to his employment with his previous employer would be reading into the act a provision which is nowhere in the act, and which neither the circumstances surrounding the same as shown in the act nor the purpose thereof would warrant. It might be added that such a construction, instead of being a benefit to the employer, might well prove a detriment, as in a case where the employee remained, after his return to work, for a period of seventeen months and then quit such employment. Under the construction contended for by plaintiff in error he still would have six months, or a total of twenty-three months, instead of eighteen months, in which to file a claim.

Nor can we agree with the contention of counsel for plaintiff in error that this question of the period of time in which claim may be filed renders said act unconstitutional, as denying equal protection of the law. The circumstances of the employee who does not return to his employment are not the same as those where one does so return, as the relation of employer and employee does not exist in the former case. The legislature might well have conceived that, under circumstances affected by the fact that the employee has returned to service with his former employer, he is to

be given an additional period of time in which to make claim. While it is true an employee may return to his employment, under paragraph (d), for a period of a few days or a few weeks and thereby gain the advantage of additional time in which to file his claim, yet such is the plain provision of the act and such act lies within the power of the legislature to pass.

Plaintiff in error's second contention is that the circuit court erred in entering a money judgment and ordering execution to issue thereon. It appears from the record that the proceedings in the circuit court were by writ of *certiorari* to review the findings and award of the Industrial Commission, and these proceedings were brought under clause 3 of paragraph (f) of section 19, which provides, in part, as follows: "No such writ of *certiorari* shall issue * * * unless such one * * * shall file with the clerk of said court a bond conditioned that if he shall not successfully prosecute said writ * * * he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court." Paragraph (g) of the same section provides for the proceedings by which a money judgment may be entered against the employer, and applies only where no proceedings for review of the decision of the Industrial Commission have been taken and where there has been a refusal to pay an award upon which no review has been sought. Concerning proceedings under paragraph (g), it is provided: "Judgment shall not be entered until fifteen days' notice of the time and place of the application for the entry of judgment shall be served upon the employer by filing such notice with the Industrial Board; which board shall, in case it has on file the address of the employer or the name and address of its agent, upon whom notices may be served, immediately send a copy of the notice to the employer or such

designated agent; and no judgment shall be entered in the event the employer shall file with the said board its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision, or the said decision, upon review, shall be affirmed."

The only authority which the circuit court had on review by *certiorari* was to affirm the findings and award of the Industrial Commission or to set aside the same and enter such a decision as is justified by law, or remand the cause to the commission for further proceedings. (*Peabody Coal Co. v. Industrial Com.* 287 Ill. 407.) It is the intention and purpose of the Workmen's Compensation act that a bond shall be given by the employer on petition for review by *certiorari*, as was done here, so that in case the findings and award of the commission are affirmed the employee shall be fairly protected by such bond, thereby rendering the entering of a money judgment unnecessary. If this were not true and a money judgment were entered against the employer, in cases where payments are to cover a period of years it would result in affecting the title to property held and owned by the employer and subject him to an inconvenience and damage wholly unnecessary. The employee is amply protected by the bond.

The circuit court therefore erred in entering a money judgment and in ordering execution. That court should have entered an order affirming the award of the Industrial Commission and that the cost of the *certiorari* proceedings be paid by the petitioner therein. For this error the judgment is reversed and the cause remanded, with directions to the court to enter a judgment in conformity with the views herein expressed.

Reversed and remanded, with directions.

(No. 11944.—Reversed and remanded.)

OSCAR H. OGDEN, Plaintiff in Error, vs. THE ROCKFORD
STAR PRINTING COMPANY, Defendant in Error.

Opinion filed June 18, 1919.

1. LIBEL—*two separate libels cannot be joined in one count of declaration.* Two or more causes for separate libels or slanders may be united in one declaration but should not be united in one count, and when so joined the count is double and demurrable.

2. SAME—*plea of justification should be as broad as the charge.* If one is guilty of publishing the whole of the alleged defamatory matter he cannot justify by showing that some part of the defamatory matter, though divisible from the rest, is true, as a plea of justification must be as broad as the charge, requires certainty of averment and should contain no other averments except the matters justified.

3. SAME—*publication may be libelous per se without charging a crime.* Under the definition of libel in section 177 of the Criminal Code it is not necessary to charge one with a crime to make the charge libelous *per se*.

4. SAME—*what questions are for jury.* The question whether or not any particular meaning is libelous is for the court, but the meaning to be ascribed to the words published and whether they referred to the plaintiff are questions for the jury.

5. SAME—*what defense is admissible under the general issue.* A denial that certain portions of the alleged libelous matter were spoken of the plaintiff is a defense which is admissible under the general issue.

6. SAME—*when witnesses may testify that they understood a libelous article was published concerning the plaintiff.* Witnesses cannot testify that they understood by the language of the article published that the libelous words were spoken of and concerning the plaintiff unless the defendant disputes the fact and offers evidence to prove that the words referred to another person or object, when the plaintiff may offer proof on the question in rebuttal.

7. SAME—*when question as to truth of article published is leading.* Where a libelous article charges a political candidate with advocating disreputable policies and presumes to quote from said candidate's speech at a public meeting, in an attempt to prove the truth of the article published, witnesses, after reading the article, should not be asked whether the plaintiff spoke the words quoted, as such question is leading and relieves the witnesses of testifying to what they really remembered to have been spoken.

8. SAME—*when books and newspapers are not admissible.* Extracts from books which are not public documents, and from newspapers, are hearsay evidence of a low order and are inadmissible as original evidence, and where a libelous article charges a socialist candidate with advocating disreputable policies, books and newspapers on socialism are not admissible to prove truth of the libel.

9. SAME—*truth is a defense only when published with good motives and for justifiable ends.* Section 4 of article 2 of the constitution is clear and unequivocal that the truth is a defense in both civil and criminal suits for libel only when published with good motives and for justifiable ends, and said section needs no statute to put it in force but is self-executing.

10. SAME—*newspapers are not privileged to publish libelous matter against candidates for office.* It is not the privilege or duty of one publishing a newspaper to publish libelous matter against any candidate for public office, and such person has no more right in that regard than any other person, as the liberty of free speech and of free press are the same.

11. SAME—*public may freely comment on conduct of candidate for office.* Where one becomes a candidate for a public office he is considered as putting his character in issue so far as it may respect his fitness and qualifications for office, and his acts may be canvassed and his conduct boldly censured.

12. SAME—*intention to serve public good cannot justify false defamation of private character of candidate for office.* The publication of falsehood or calumny against public officers or candidates is an offense injurious to the people, and an intention to serve the public good in such a case cannot justify a defamation of private character.

13. SAME—*what matters are not a defense but go only in mitigation of damages.* To a malicious publication of libelous matter against a candidate for public office there is no defense on the ground that it is privileged, and it is not a defense that it is mistakenly and honestly made but such matters go only in mitigation of damages.

14. SAME—*in the same plea matters of mitigation should not be mixed with matters of justification.* Matters in mitigation of damages and matters which amount to a denial of the charge are admissible under the general issue and should not be mixed up in a plea with matters of justification.

15. TRIAL—*presents should not be given to or received by juror.* Presents should not be given to or be received by a juror in any case, as such acts must necessarily produce bad impressions, no

matter how good the intentions may be and however harmless they may in fact be to the loser in the case.

16. SAME—*jurors should not be allowed to read newspaper comments on the trial.* In a case having much notoriety and which has aroused public feeling it is the absolute duty of the court to instruct the jury so positively and firmly that no juror will be likely to obtain newspapers printing matters of evidence or comments on the proceedings, and the court has full power to take whatever steps are necessary to secure a fair trial by instructing the jury, holding it together or removing newspaper reporters from the court room.

WRIT OF ERROR to the Circuit Court of Winnebago county; the Hon. CLAIRE C. EDWARDS, Judge, presiding.

ROY F. HALL, for plaintiff in error.

FISHER, NORTH, WELSH & LINSOTT, (R. K. WELSH, of counsel,) for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court :

Oscar H. Ogren, plaintiff in error, (hereinafter known as plaintiff,) began suit in the circuit court of Winnebago county against the Rockford Star Printing Company to recover damages for the publication of three alleged libels. The jury returned a verdict of not guilty and judgment was entered against plaintiff. This writ of error is sued out of this court and jurisdiction invoked on the ground that a constitutional question is involved.

The plaintiff had lived in Rockford for many years, was married and had one daughter about ten years old. His father's family also lived in Rockford. Plaintiff had worked at different occupations, served two terms in the city council and had been at a previous election a candidate for mayor of Rockford, and was at the time of the publications alleged to have been libelous a candidate for mayor on the socialist ticket. In the election in question he had as his only opponent W. W. Bennett. The alleged libelous articles were published by the defendant in the manner of

advertisements during this campaign, one at a time on three different days, April 15, 16 and 17, 1915, in its newspaper, the *Rockford Morning Star*. Each article was made the subject of a count in the plaintiff's declaration. So far as they are made a part of the declaration and appear in the abstract they are here copied verbatim in the order in which they were published, and are numbered, respectively, 1, 2 and 3, to-wit:

1. "The real issue is *Socialism*. Rockford faces a calamity. Without evasion or digression, the real, impending and fearful cloud hanging over Rockford to-day is, *The Menace of the Red Flag*. Do you want to turn Rockford over to that emblem? * * * This is a typical expression of socialistic thought. Do not be deceived by sugar-coated and misleading speeches being made on the stump now by Mr. Ogren to get votes. *Stop and Think*. Find out what socialism really is. Meet the issue without passion or prejudice. Before you decide how you will vote next Tuesday, inform yourself. A vote for Oscar Ogren will be a straight vote for socialism."

2. "*Twenty-five New Industries have been established in Rockford during the past four years*. Will one industry locate here if we elect a mayor who, upon taking his seat in the council, made this statement? Statement by alderman Oscar Ogren on taking his seat in council May 3, 1909: 'I have been elected by the socialist party of my ward. All my votes and my actions while in this council will be in direct opposition to all corporations, regardless of what the question or the issue is. That is why I am here—that is my mission in the council.' * * * Honest workingmen want work. Gab, dynamite and blowing tenement houses to hell *do not* produce work. Socialism would destroy the American home. A vote for Ogren is a vote for socialism."

3. "*Socialism* means terror, unrest and financial ruin. None of these citizens want the red flag: The working-

man—who values a steady job. The home owner—who wants it protected. The man with a savings account—who wants it to grow. The young man—who is looking to the future. The minister—whose calling should be honored. The doctor—who is serving humanity. The merchant—who deserves a square deal. The lawyer—who stands for human rights. The plain, substantial citizen—who puts patriotism and civic pride before class prejudice and sectional hatred.

“No woman can be true to herself and her home and vote for socialism. No mother—who has a son or daughter. No first voter—who regards the ballot justly. No housewife—who loves her home and family. No club woman—who knows the needs of womanhood. No woman wage earner—who knows the evils of business unrest. No professional woman—who knows the danger of epidemics. No church member—who appreciates the sanctity of her church. No school teacher—who wants sanity to prevail. No student—who understands American tradition. Not one of these women would be spared—were the wild dreams of socialists given official sanction. A vote for *Ogren* is a vote for socialism. Vote for Bennett and preserve the peace and good will of Rockford.

“Rockford’s socialism is the rankest of all. Not one of the writers in all the socialist propaganda could be more violent than this one. A vote for *Ogren* is a vote for this platform. * * * Do you want Rockford to become the testing ground for every wild scheme which might be presented by men who urge the use of dynamite and blowing tenements to hell? *Rockford is in danger. It needs every vote.* A vote for Ogren is a vote for socialism.”

The three articles all contained the following words and sentences at the respective places in the articles as above copied where the stars or asterisks occur and are to be considered as inserted in each article at the places thus indicated, to-wit: “Read what Oscar Ogren, now candidate

for mayor, said at a public meeting at the Majestic Theatre, February 12, 1915: 'We don't want work. What we want is a division of those profits that have already been made. I am a rebel. There are men out there in this audience that are just as big rebels as I am, but they haven't the gift of gab that I have. If you really want work I know where to make it, and I am in favor of going into Chicago and taking dynamite and blowing those tenement houses to hell!' " The words just quoted were printed near the center of the newspaper article first printed, with a heavy border around it, with a hand pointing towards it from either side. In the second article both speeches of Ogren, in the council and in the theatre, were printed near the center of the article, side by side, with a light border around each. In the third article the words of Ogren alleged to have been spoken at the theatre are near the center of the article or page, with a light border around it and with a hand on the left pointing to it and these words printed under the hand and immediately at the left of the left-hand border: "A vote for Ogren is a vote for this platform."

There was a fourth count to the declaration which combined the charges in all three of the other counts, or, rather, made the three publications as the basis of that count. It is a good cause of demurrer in actions at law under the common law system of pleading that two or more causes of action are joined in one and the same count of the declaration. When they are so joined the count is double and for that reason demurrable. Declarations for libel follow the same rule. Two or more causes for separate libels or slanders may be united in one declaration but should not be blended in one and the same count. (13 Ency. of Pl. & Pr. 60.) The publications are all distinct publications, and the latter two are not continuations of an incompleted publication or charge.

The defendant filed the general issue and three special pleas,—one to each of the other three counts of the dec-

laration. The substance of the first special plea is that the plaintiff was a candidate for mayor of Rockford on the socialist ticket and that there were other socialist candidates for other offices of the city on said ticket; that there then existed in said city a political and propagandist organization known as the socialist party, which was devoting itself to the alleged principles, doctrines and proposals of socialism; that plaintiff, as such candidate, represented that party and all its alleged principles, doctrines and proposals; that as publisher of its daily newspaper it was defendant's privilege and duty to publish for the information of its patrons and the city of Rockford the alleged principles and doctrines and proposals of any political party nominating candidates for said offices and report the attitude and beliefs of any such candidates upon governmental, municipal, civic and social questions; that in accordance with its right and duty defendant did on said date publish in its newspaper of and concerning socialism, but not of and concerning the plaintiff, certain matters, the certain matters being all of said article except the alleged words spoken by plaintiff at the theatre and the last sentence of said article and one other sentence. In the same plea the defendant justified by averring that Ogren did in a public speech utter the words alleged to have been spoken at the theatre, and also by averring that it was true that plaintiff was then making sugar-coated and misleading speeches to get votes, as charged in said article. The last sentence of said article was not covered by any averments in the plea. A similar plea was filed as to the second and third counts, wherein the defendant likewise averred that it published certain parts of the second and third articles of and concerning socialism and justified as to certain other parts in the same plea, and failed to plead at all as to other sentences in the article.

Plaintiff by leave replied doubly to the special pleas, after joining issue on the plea of the general issue. By his second replication plaintiff denied the allegations in all the

special pleas. His third replication was to the effect that even though the defendant published certain matters of and concerning socialism, only, yet persons who read the articles understood such parts to have been published of and concerning the plaintiff. It is sufficient to say that plaintiff shows no ground for complaint at the court's sustaining a demurrer to his third or special replication. If any such matters are proper at all they were admissible under the issues previously found. It is not insisted that the demurrer should have been carried back to any of the special pleas, and no such motion or action appears to have been insisted on by plaintiff in the lower court.

The plea of justification must be as broad as the charge and requires certainty of averment. (17 R. C. L. 400.) It should contain no other averments except the matters justified. If one is guilty of publishing the whole of the alleged defamatory matter he cannot justify by showing that some part of the defamatory matter, though divisible from the rest, was true. (17 R. C. L. 401.)

The articles published as aforesaid are libelous *per se*. It will be observed that none of the articles charge plaintiff with a crime. The most that can be said in that regard is that they charge him with favoring crime,—that is, blowing up tenement houses with dynamite. It is by the language of the articles clear that they do charge him with being one of the rankest of socialists. In the third article it is charged that Rockford's socialism is the rankest of all, and that not one of the writers in all the socialist propaganda could be more violent than this one. The declaration charges that the words "this one" mean or refer to plaintiff, and there can be no doubt that this is true. The plaintiff was the main subject of the article. It was his election as mayor that was referred to as the great menace to the citizens of Rockford. The article did refer to socialism also as the danger, but further charged that a vote for plaintiff was a vote for socialism, and evidently means Rockford's

socialism, "the rankest of all,"—the socialism that "means terror, unrest and financial ruin" to men and women of Rockford,—and recommended as the only remedy a vote against Ogren or for Bennett, to "preserve the peace and good will of Rockford." It would seem that there is no escaping it that such words were spoken of and concerning the plaintiff, and, by charging him with making the two speeches or alleged statements at the council meeting and at the theater building, the second article in substance charged that he himself had declared himself as a man who would by his official acts be opposed to and decide against corporations, right or wrong, upon all questions; that he was in favor of a division of profits already made and without further work,—a rebel against the present system and in favor of blowing up tenement houses, etc. There can be no question that such charges tend to impeach the honesty, integrity and reputation of plaintiff and to expose him to public hatred, contempt and ridicule. Section 177 of our Criminal Code defines libel as a malicious defamation, expressed by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury. Under such a statute it is not necessary to charge one with a crime to make the charge libelous *per se*. *Cerveny v. Chicago Daily News Co.* 139 Ill. 345; *Dowie v. Priddle*, 216 id. 553; *People v. Fuller*, 238 id. 116.

Where the words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question as to whether or not any particular meaning is libelous is for the court. Where there is a controversy as to whether or not words were spoken of and concerning the plaintiff, the question whether they were so spoken is for the jury. (*Ball v. Evening American Publishing Co.* 237 Ill. 592.) In this case the

defendant by its special pleas denies that certain portions of the articles were spoken of plaintiff,—a defense which is admissible under the general issue. Plaintiff offered witnesses to prove that by the language of the articles they understood the words in question to be spoken of and concerning plaintiff, but on objection the court refused to admit the evidence. We think the better rule is, that where the language is clear and unambiguous, as it is in this case, and such as there can be little or no doubt of its being spoken of and concerning plaintiff, no such evidence is admissible for plaintiff in the first instance, but if the defendant disputes the fact and offers evidence to prove it,—where, as here, the evidence also refers to another person or object,—then it would be proper for the plaintiff to offer proof on the question in rebuttal. No such evidence was given for the defendant, and we hold the court did not err in this particular.

The court committed error in excluding all of the first article except the alleged words of plaintiff spoken by him at the Majestic Theatre. The whole article set out in the declaration should have been admitted, so that the meaning of the same could be fully and properly understood.

The defendant, in introducing its proof under the pleas of justification, submitted the matter sought to be justified in each instance by delivering the published articles to the witnesses, and, after first calling their attention to these matters, asked the witnesses if the plaintiff spoke those words at the council meeting and at the Majestic Theatre. After reading the matters thus offered the witnesses answered in each instance, "Yes," over the objection of the plaintiff that the question was leading. This was error. The question could not well be more leading and more suggestive of just what answer was wanted, which is one of the real tests of whether or not a question is leading. The question furnished the witnesses in advance the full information as to what the defendant's claim was that plaintiff did say on

those occasions, and relieved the witnesses of testifying as to what they really remembered to have been spoken.

It was also error to admit evidence, in substance, that a number of writers on socialism had declared that the church as it exists is a capitalistic institution and under socialism must go. It was for similar reasons absolutely improper to introduce certain passages in certain books, one by Bernard Shaw, another by Morris and Bax, and still others, who were foreigners who had lived in Europe, and also an article from a socialist newspaper. Most all of these books contained very radical chapters attacking the indissolubility of marriage and our marriage laws, and advocating that a man should be allowed to discard his wife when he is tired of her, and the wife the husband when she is tired of him. There was no proof that plaintiff was a believer in that doctrine or had ever advocated it or had ever read those books. The defendant's own witness who identified the books expressly testified that the socialist party of America had never adopted such books, and was quite sure that the socialist party of Rockford never had adopted any of the sentiments contained in the extracts read from said books. They were hearsay evidence of a low order, and the rule has ever been that such books and newspapers are inadmissible as original evidence in trials before courts. (3 Jones' Commentaries on Evidence, secs. 578-582.) Of the same character of objectionable evidence, and of the most prejudicial character, was the proof admitted that President Wilson refused passports to Europe to Berger, of Milwaukee, and to Lee and Hillquit, of New York,—American socialists. The grounds of the President's refusal were not proved or even suggested, and if such proof had been made, the evidence had no tendency to prove any issue in this case and could only serve to prevent a fair and impartial trial.

Section 4 of article 2 of the constitution of Illinois provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that lib-

erty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." This section clearly and unequivocally lays down the full and correct rule for this State, when the truth is a defense to a libel, in both civil and criminal suits. It appears this is the first time the question has been raised in a civil suit since our last constitution was adopted, but there is no mistaking the meaning of that section, which is, that the truth is a defense in both civil and criminal suits only when published with good motives and for justifiable ends. The above section of the constitution is clear and unequivocal, and states a sufficient and definite rule by means of which a defendant may establish a defense to a publication that is libelous in its character. It is, therefore, self-executing and needs no statute to put it in force. (Cooley's Const. Lim.—4th ed.—sec. 82, p. 101.) Our statute does not make any provision on the question except to provide that it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of testimony. Our attention has been called to the decision of *Castle v. Houston*, (Kan.) 27 Am. Rep. 127, which, it is claimed, holds otherwise. The constitution of Kansas is differently worded, and that decision is based on the ground that the word "accused" has reference to a party indicted or charged criminally, and not to a defendant in a civil suit. The language construed is, "in all civil or criminal actions for libel the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends the accused party shall be acquitted." The Nebraska constitution is exactly like ours, and in *Wertz v. Sprecher*, 82 Neb. 834, the court construed the constitution, and held that truth, alone, is not a complete defense in a civil action for libel, and if the defendant justifies he must further allege and prove that he published the defamatory matter with good motives and for justifiable ends. The Supreme

Court of Florida makes a similar holding upon a similar provision in its constitution, in *Taylor v. Tribune Publishing Co.* 67 Fla. 361. At common law the rule was that truth of the alleged libel, when established, was a defense, and that was the law in this State before our last constitution was adopted.

It is not the privilege or duty of one publishing a newspaper to publish libelous matter against any candidate for public office. Such person has no more right or privilege in that regard than any other person in the same community. The liberty of free speech and of free press is the same in that regard. When anyone becomes a candidate for a public office, conferred by the election of the people, he is considered as putting his character in issue, so far as it may respect his fitness and qualifications for office, and everyone may freely comment on his conduct and actions. His *acts* may be canvassed and his *conduct* boldly censured. But the publication of falsehood and calumny against public officers or candidates for such offices is an offense most dangerous to the people and the subject of punishment, because the people may be deceived and reject the best citizen, to their injury. An intention to serve the public good in such a case cannot authorize or justify a defamation of private character. (*Rearick v. Wilcox*, 81 Ill. 77; *Sweeney v. Baker*, 31 Am. Rep. 757; *Jones v. Townsend's Adm.* 58 id. 676.) To a malicious publication of libelous matter against a candidate for public office there is no defense on the ground that it is privileged, and it is not a defense that it is mistakenly and honestly made. Such matters go only in mitigation of damages.

A number of instructions are challenged and discussed as erroneous as given by the court. We have virtually settled all those questions in the holdings already made and we deem it of no value to further discuss the instructions in detail, as the errors, where error is committed, may be avoided on another trial.

In view of what has already been said it seems to us proper to suggest that the pleas of the defendant ought to be re-drawn and the issues correctly presented according to the views herein expressed. Matters of mitigation, only, are admissible under the general issue and should not be mixed up with matters of justification in the same plea. The same is true of matters which amount only to a denial of the charge. As indicated, the case will have to be reversed for the errors already pointed out in this opinion.

It is finally called to our attention by various affidavits and admissions of the jurors and of the defendant that the entire jury, or about all of them, were each treated to a box of cigars and given six months' free subscription to the defendant's paper after the trial was over. While this may not have affected the verdict of the jury, we feel constrained to say that no litigant owes any jury one penny or any unusually friendly acts or demonstrations of any kind for an honest verdict. Presents should not be given to or be received by a juror in any case. Such acts must necessarily produce bad impressions, no matter how good the intentions may be and however harmless they may in fact be to the loser. It does appear, however, that one or two of the jurors saw, and may have read, the comments of the defendant made in its newspaper during the progress of the trial, and in which it was also related how the judge rescued the jury from confinement by overruling plaintiff's motion to have the jury kept together and not allowed to separate, etc. It is the absolute duty of the court to instruct the jury so positively and so firmly in a case of so much notoriety and feeling that no juror would be likely to see newspapers printing matters of evidence or other comments on the proceedings. It has full power to take whatever steps are necessary to the securing of a fair trial, by instructing the jury, holding it together, removing newspaper reporters from the court room, if necessary, or by such other acts as will prevent a recurrence of matters of

which complaint is here made, and it should do so without either party being censured by the jury for the court's actions.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

(No. 12552.—Decree affirmed.)

JOHN M. KANE *et al.* Appellees, *vs.* OSCAR L. WEIS *et al.*
Appellants.

Opinion filed June 18, 1919.

TAXES—*levy of high school tax is invalid after final judgment dissolving district.* The levy of a high school tax is invalid when made after a final judgment dissolving the organization of the district, and where the proceedings attacking the organization of the district had ended and were not pending in any court when the curative act of 1917 was passed, the levy is not valid though made after the passage of that act. (*People v. Stitt*, 280 Ill. 553, distinguished.)

APPEAL from the Circuit Court of Livingston county;
the Hon. GEORGE W. PATTON, Judge, presiding.

C. M. CLAY BUNTAIN, and H. E. TORRANCE, for appellants.

ADSIT & THOMPSON, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill in equity filed in the circuit court of Livingston county by certain tax-payers of an alleged high school district situated in the counties of Livingston, Kankakee and Grundy, to restrain, on behalf of complainants and other tax-payers in said district, the collection of certain high school taxes levied for the year 1917. After the plaintiffs in error answered, the cause was heard by the trial

court on bill and answer and a decree entered restraining the collection of said taxes. From that decree this appeal was prayed.

In May and June, 1915, the alleged district was attempted to be organized under the High School act of 1911. A *quo warranto* proceeding was brought in the circuit court of Livingston county as to the legal organization of the district and a decree entered holding the organization invalid and dissolving it. The judgment of the circuit court was affirmed on appeal to this court. (*People v. Weis*, 275 Ill. 581.) There was no attempt made, so far as appears from the record, to re-organize such district after the decision by this court in that case. The same persons who originally acted as the board of education attempted to levy taxes in 1916, and the validity of that levy was passed on by this court in *People v. New York Central Railroad Co.* 283 Ill. 334, the tax for that year being held invalid because there was no *de jure* or *de facto* school district. No steps were taken by the school authorities of said district thereafter to re-organize said district, and it is conceded the only material difference in the situation with regard to the tax levy so held invalid in the last named case and the levy here in question is, that the taxes so held invalid were levied before the passage of the so-called curative act of June 14, 1917, while the taxes here in question were levied after said act became effective. It is now argued that the district became at least a *de facto* organization, having been made a valid district by the curative act, and that therefore the tax levy for 1917 should be held valid.

This is the identical district concerning which the High School act of 1911 was declared unconstitutional. After the decision of this court in that case no attempt was made to keep the legal proceedings alive in any court, and under the reasoning of this court in *People v. New York Central Railroad Co. supra*, and the recent decision in *People v. Owen*, 286 Ill. 638, it must be held that the legislature had

no power to set aside the final judgment of the courts and validate the organization of this district after such final judgment had been entered. Nothing has been said in any way conflicting with this conclusion of this court in any of the decisions holding the present curative act valid, including *People v. Madison*, 280 Ill. 96, *People v. Gunn*, 281 id. 244, *People v. Mathews*, 282 id. 85, and *People v. Stitt*, 280 id. 553. Counsel for defendants in error concede this except as to *People v. Stitt, supra*, and it is insisted that the facts in that case are so very similar to those raised here that under the reasoning of that decision this tax should be held valid and the district a *de facto* organization. It is clear from the reasoning of this court in this last named case that the original court proceedings were still pending and undecided at the time the opinion was written in *People v. Stitt, supra*, and on that record that case is clearly distinguishable from this one, as here no court proceedings were pending at the time the curative act was enacted. The final decision of this court in *People v. Weis, supra*, had been theretofore made and the court proceedings ended long before the enactment of the curative legislation or the levy of this tax. If anything was said in *People v. Stitt, supra*, contrary to the conclusion here reached, that reasoning was, in effect, overruled in *People v. New York Central Railroad Co. supra*, and *People v. Owen, supra*, and if there is anything said in the opinion in the *Stitt case* seemingly contrary to this conclusion it is hereby in terms overruled. In no possible way can this case be distinguished, on principle, from the decision of this court in *People v. New York Central Railroad Co. supra*, or *People v. Owen, supra*.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(No. 12503.—Reversed and remanded.)

SPIEGEL'S HOUSE FURNISHING COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(KATHERINE JARRETT CLOYES, Admx., Defendant in Error.)

Opinion filed June 18, 1919.

1. **WORKMEN'S COMPENSATION**—*declarations of a deceased employee as to how he was injured are not admissible.* Declarations made by an injured employee to his attending physician are admissible when they relate to the part of the body injured, to the suffering and the symptoms but not if they relate to the cause of the injury, and the testimony of any witness as to what the injured employee said about when, where and how he was injured is not admissible.

2. **SAME**—*jurisdiction of courts of review under Compensation act.* The circuit court, and the Supreme Court in reviewing a case under the Workmen's Compensation act, can only pass upon questions of law and cannot reverse an order of the Industrial Commission as not sustained by the evidence unless there is no competent evidence in the record tending to support it.

3. **CORONER'S VERDICT**—*coroner's verdict is not admissible to establish civil liability.* A coroner's verdict or inquest is not admissible as evidence in civil suits for the purpose of establishing personal liability against any individual where the death of a person is charged or to establish a defense to such suits or for the purpose of establishing other issues between private litigants. (Contrary holdings in *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, and in all subsequent cases, overruled.)

4. **EVIDENCE**—*a judgment is not admissible against a litigant who was not a party to it.* The judgment of a court is not admissible against a litigant, either as *res judicata* or as an estoppel by verdict, unless he was a party to that judgment, and no person can be affected by any judicial investigation to which he is not a party unless his relation to some of the parties was such as to make him responsible for the final result of the litigation.

5. **SAME**—*testimony of witnesses taken before coroner's jury is not admissible in a civil suit.* As the testimony of a witness in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment, the testimony of witnesses taken before a coroner's jury is not admissible against either party in a subsequent civil suit for damages.

6. STARE DECISIS—*when former rulings on admissibility of evidence will not be followed.* Former rulings on the admissibility of certain documents as evidence or on mere questions of procedure ought to be followed unless they are manifestly wrong, but they may and should be changed when the ends of justice and the public good will be better served.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

FRANK M. COX, and ALBERT N. POWELL, for plaintiff in error.

NORMAN G. COLLINS, for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

The circuit court of Cook county confirmed an award by the Industrial Commission under the Workmen's Compensation act, on the application of Katherine Jarrett Cloyes, administratrix of the estate of Harry J. Cloyes, deceased, and certified that the cause, in its opinion, is one to be reviewed by this court.

The evidence produced before the Industrial Commission was in substance the following: Harry J. Cloyes was a regular employee of Spiegel's House Furnishing Company. The last day he worked for his employer was Tuesday, June 20, 1916. The next day he was not feeling well and remained at his home and took medicine for a cold. He had fever, his temperature being about 100 degrees, and it so continued until Thursday, when a physician was called for the first time. The physician thought probably that he had "grippe" but called again on Friday, when Cloyes showed him an abrasion on his arm, over which a scab had formed about the size of a nickel and there was a slight redness of the skin around the scab. The doctor did not that day attribute the condition of his patient to the injury on his arm. On Saturday the doctor found the skin around the scab was much redder in appearance and

that it had spread in every direction. He testified that it was apparent that the injury was caused by an external blow and that the trouble was infection from the injury on the arm, and that the arm was swollen; that on Sunday the patient's condition was worse and continued to grow worse until Monday, when he was sent to a hospital and an operation was performed on the same day; that he died two hours after the operation, and that his death was caused by septicemia, produced by infection of the wound.

No one saw Cloyes receive the injury, and he did not tell his employer or any of his fellow-employees about receiving it. The only proof that the injury arose out of and in the course of his employment was (1) the testimony of his widow and of his physician that he told them he received his injury at his employer's store while passing through a narrow aisle while showing customers goods in plaintiff in error's store, and by striking his arm, just above the elbow, against the sharp corner of a dresser; and (2) the coroner's verdict reciting that Cloyes came to his death June 26, 1916, from septicemia, due to an infected wound of the right arm, received at Spiegel's House Furnishing Company while in the employ of said company as a salesman, by striking his arm against a dresser. Plaintiff in error objected to the evidence of the widow and the physician and the coroner's verdict as hearsay evidence and as incompetent.

Cloyes left surviving him as dependents a minor son and his widow. He and plaintiff in error were both operating under the Compensation act, and his widow gave plaintiff in error notice in apt time that Cloyes claimed to be injured and the time and manner that he claimed to be injured.

The plaintiff in error offered the transcript of the testimony taken before the coroner's jury for the sole purpose of showing that the verdict was based on the same hearsay evidence of the same witnesses heard before the Industrial Commission and on no other testimony. That evidence

clearly proved its contention that it was hearsay testimony, and the same, in substance, as the evidence of the widow and the physician, which was objected to as hearsay and as incompetent.

The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where and how he received the injury and what he was doing at that time. No one testified who had any knowledge of those facts except from the statements made to them by the deceased. Declarations made by one injured, to his attending physician, are admissible when they relate to the part of his body injured, his suffering, symptoms and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago and Alton Railroad Co. v. Industrial Board*, 274 Ill. 336.

If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest and without the sanction of an oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence or even by the right of cross-examination. This is so because the circuit court and this court, under our Compensation act, can only pass upon questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear

that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury or to contradict the evidence tending to prove the liability against it, which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing and to violate the most elementary and sacred rules for the administration of justice between private individuals guaranteed by our laws and our constitutions, both State and national.

The injustice and the out-and-out viciousness of such a holding will more strikingly appear to all minds if we but consider that we may at any time have another state of facts in a case that would defeat the rights of the widow and children of the deceased injured employee by a similar holding. Let us suppose that the deceased party was killed outright by revolving machinery while at work at his employment and was never able to state how the injury occurred; that the superintendent of the employer and one other fellow-employee were the only eye-witnesses to the injury; that the superintendent made declarations of the facts that showed deceased was not injured while working at his employment or by reason of such employment and died before he could testify; that a coroner's jury was empaneled and the declarations of the deceased superintendent were put in evidence before the jury by some attorney representing the employer and that the widow and children's interests were not there represented and that the

fellow-employee did not testify before the coroner's jury, and that the coroner's jury returned a verdict that deceased was killed by some other agency not connected with his employment and completely exempted the employer from all blame or connection with the death of the employee. We can readily understand that if the verdict of the coroner's jury furnishes such convincing proof of the facts therein found as is evinced by this record, the widow and children in the case just supposed might be defeated in the contest before the Industrial Commission by the introduction of the coroner's verdict although the fellow-employee might appear and testify, and particularly if the employer was able to offer the testimony of several witnesses whose testimony tended strongly to impeach his evidence. On a review of such a case, this court and the circuit court would be powerless, under the law, to weigh the evidence and to pass on its weight. It is apparent that the result of holding a coroner's verdict competent evidence in such a case will result in substituting coroner's verdicts and holdings that the injury to the deceased employee arose out of and in the course of his employment for those of the Industrial Commission, and in direct contravention of the very spirit and express provisions of the Workmen's Compensation act.

The foregoing conclusions cast no reflection upon the coroner or his juries. They are not supposed to be men educated in the law. They do their duty as they understand it. The chief blame for such results cannot be placed on the Industrial Commission. Such results have been made possible by the previous holdings of this court, in many cases of various character, that the verdict of a coroner's jury is admissible in such cases between private citizens as *prima facie* evidence to establish any fact or facts which our statute requires such juries to find when empaneled by the coroner, if such fact or facts are material in the trial of such cases. Our statute requires that every coroner, whenever and as soon as he knows or is informed that the

dead body of any person is found or lying within his county, supposed to have come to his or her death by violence, casualty or any undue means, shall repair to the place where the dead body is, take charge of the same, forthwith summon a jury and swear them to diligently make the inquiries required by the statute and to deliver to him a true inquest thereof. The jurors are required to inquire how, in what manner and by whom or what the said body came to its death, and of all the facts of and concerning the same, together with all material circumstances in anywise related to or connected with said death, and to make up and sign a verdict or true inquest.

For almost thirty years, as already indicated, this court has held that the verdict of the coroner's jury was admissible either for the plaintiff or the defendant in a civil suit for the purpose of showing *prima facie* some fact or facts found by the jury and appearing on the face of the inquest, when the proof of such fact or facts is material to some issue in the civil suit. We have held that such verdicts were competent to prove *prima facie* suicide of the assured in suits on insurance policies. (*United States Life Ins. Co. v. Vocke*, 129 Ill. 557; *Grand Lodge I. O. M. A. v. Wieting*, 168 id. 408; *Knights Templars Indemnity Co. v. Crayton*, 209 id. 550.) In *Pyle v. Pyle*, 158 Ill. 289, the case was a bill to construe a will, and on the issue of insanity of the testator the coroner's verdict that testator suicided was held admissible. The issue in a suit for damages for assault and battery was whether or not defendant was guilty of unlawful, willful and wanton conduct, and the holding was that the verdict of the coroner's jury that the defendant fired the shot that killed the deceased but was justified in the act was competent on that issue. (*Foster v. Shepherd*, 258 Ill. 164.) In other suits for negligently causing death it has been frequently held that the inquest of the coroner is admissible to show *prima facie* how and by what means the deceased came to his death, and any other mat-

ter properly before the coroner and appearing on the face of the inquest. (*Novitsky v. Knickerbocker Ice Co.* 276 Ill. 102; *Stollery v. Cicero Street Railway Co.* 243 id. 290.) It is said in the *Novitsky case* that it is not within the province of the coroner's jury to fix the civil liability of anyone growing out of an accident resulting in death, except in so far as the finding required to be made by the statute may have such effect. In *Devine v. Brunswick-Balke-Collender Co.* 270 Ill. 504, for negligently causing the death of a child in driving an auto truck, the holding is that the verdict of the coroner's jury finding that the driver of the truck "was blameless for this unfortunate occurrence, and we therefore recommend his discharge from further custody," was admissible, because the question whether or not the driver was blameless was an essential matter before the coroner's jury for their investigation and a proper matter to be included in their verdict. Under the Workmen's Compensation act our holdings have been that the coroner's verdict at the inquest on the body of the employee is admissible in evidence in a case for compensation for death of the employee, and is *prima facie* evidence tending to prove the cause of death and of the facts therein recited showing that the employee received his injury in the course of his employment. (*Armour & Co. v. Industrial Board*, 273 Ill. 590; *Ohio Building Vault Co. v. Industrial Board*, 277 id. 96; *Morris & Co. v. Industrial Board*, 284 id. 67.) In the last case cited it is held that the statute made it the duty of the coroner to hold an inquest when informed that it was supposed the deceased had come to his death by casualty, and that casualty means chance, accident, contingency, etc. In *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, the holding is that where the employee dies of tuberculosis of long standing, and there is no supposition that he came to his death by violence, casualty or any undue means, the coroner was not authorized to hold an inquest and that the verdict of the coroner's jury was not admis-

sible. In *Peoria Cordage Co. v. Industrial Board*, 284 Ill. 90, it was positively held that a finding by a coroner's jury that the death of an employee resulted from an injury while in the discharge of his duty as an employee of a certain employer is beyond the province of the coroner's jury. It was further held in that case that in any case where the coroner is authorized to act, his authority is limited to an inquiry into the physical facts and to obtaining evidence for the apprehension of any person implicated in the commission of a crime, and the verdict of his jury is not admissible to fix civil liability, "except in so far as a legitimate finding of physical facts may have that effect." It is apparent that this decision is not in accord with the principles announced and with the conclusions reached in *Armour & Co. v. Industrial Board*, *supra*, and *Morris & Co. v. Industrial Board*, *supra*, but we think that the above holdings in that case state the law as it should be, except so far as it is qualified by the above clause in quotation marks.

The decisions of this court prior to the *Peoria Cordage Co. case* have been uniform in their holdings. The departure in that case from those holdings resulted by reason of the conclusion of this court that our former decisions were wrong in principle although uniform and consistent with the views of the court therein announced. The court is of the opinion that it should be no longer the policy of this State and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings expressly overruled. We are moved to do this for several reasons. A review of the above cases

clearly discloses that many of the cases, if not all of them, have been largely controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this State a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death. It is not intimated here that plaintiffs prosecuting such suits have offended more in this particular practice than defendants who are sued in such suits, and it is believed that the facts would disclose that both are alike guilty. It cannot be questioned that as a result of such practice the coroner's verdict in many cases has been, and will continue to be, a mere trap or device for the purpose of catching the unwary in such suits and that public interests intended to be served by coroner's inquests may not be so well guarded as they otherwise would be.

. The allowance of coroner's verdicts as evidence in civil suits is wrong in principle and necessarily results in much injustice to litigants. A coroner, under our law, has no judicial power. Such power is vested by the constitution in the courts thereby created. (*Peoria Cordage Co. v. Industrial Board, supra.*) At common law the office of coroner was judicial in its nature. But if he were a judicial officer, invested with judicial powers and duties, we are unwilling to further indorse the holding that any litigant should be bound by the verdict of a coroner's jury in whose inquest he had no right to participate and did not do so. The most solemn finding or judgment of a court is not admissible against a litigant, either as *res judicata* or as an estoppel by verdict, unless he was a party to that judgment. (*Chicago Title and Trust Co. v. Storage Co.* 260 Ill. 485.) The rule has always been recognized that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the

parties was such as to make him responsible for the final result of the litigation. (1 Freeman on Judgments, sec. 154.) It is a well known and well recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses. The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reasons above given. (*Pittsburg, Cincinnati and St. Louis Railway Co. v. McGrath*, 115 Ill. 172; *Knights Templars Indemnity Co. v. Crayton*, *supra*.) If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, *prima facie* or otherwise, any issue in such case.

So far as we have investigated, only two other States in this country, Iowa and Mississippi, have adopted the same rule as has this court with reference to the admissibility of the inquest of the coroner's jury as evidence in such cases. (*Metzradt v. Modern Brotherhood*, 112 Iowa, 522; *Mittelstadt v. Modern Woodmen*, 143 id. 186; *Tomlinson v. Sovereign Camp*, 160 id. 472; *Supreme Lodge Knights of Honor v. Fletcher*, 78 Miss. 377.) In the Iowa cases the admissibility of the verdict or inquest was not questioned by the parties. In the Iowa case last above cited the court indicates that it might have ruled otherwise if objections to the evidence had been raised. The decided weight of the authorities in this country is against the admissibility of such a verdict as evidence. *Ætna Life Ins.*

Co. v. Milward, (Ky.) 68 L. R. A. 285, note 296; *State v. Cecil County*, 54 Md. 426; *Dougherty v. Pacific Mutual Life Ins. Co.* 154 Pa. St. 385; *Memphis & C. Railroad Co. v. Womack*, 84 Ala. 149; *Krogh v. Modern Brotherhood*, 153 Wis. 397; *Wasey v. Traveler's Ins. Co.* 126 Mich. 119; *Cox v. Royal Tribe*, 42 Ore. 365; *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43; *Sullivan v. Seattle Electric Co.* 51 Wash. 71; *In re Dolbeer's Estate*, 149 Cal. 227; *Chambers v. Modern Woodmen*, 18 S. Dak. 173; *Walden v. Bankers' Life Ass'n*, 89 Neb. 546; *Boehme v. Sovereign Camp*, 98 Tex. 376.

No court, we believe, has gone farther than this court to maintain the maxim or doctrine of *stare decisis* when the questions decided affect the validity and control the construction of contracts or where the rules announced have become rules of property. Rulings on the admissibility of certain documents as evidence of the character here considered, or mere questions of procedure, ought to be followed unless they are manifestly wrong, but may, and should, be changed when the ends of justice and the public good will be better served. *Rich v. City of Chicago*, 59 Ill. 286; 2 Lewis' Sutherland on Stat. Const. secs. 480-314.

It will not be necessary to further discuss the questions raised relating to the coroner's verdict in question, as the court holds, for the foregoing reason, that the verdict was not admissible in evidence for any purpose. There is no competent evidence in the record tending to prove that the injury to the deceased arose out of and in the course of his employment.

The judgment of the circuit court is reversed and the award set aside, and the cause is remanded to that court for such further proceedings authorized by law as may be desired.

Reversed and remanded.

(No. 12696.—Decree affirmed.)

HERMINA M. BAKER, Appellee, *vs.* MARGARET WILMERT
et al. Appellants.

Opinion filed June 18, 1919.

1. **POWERS**—*a collateral power cannot be suspended or extinguished by donee.* A power collateral is a power of appointment which is vested in one not interested in the property made the subject thereof, and such power cannot be suspended or extinguished by any act on the part of the donee with respect to the land, nor can it be released by him except when the power is for his own benefit, as when the power is to charge a sum of money on the land for himself.

2. **SAME**—*what is a power in gross.* A power in gross is a power given to a donee, who has an interest in the land, to create by appointment an estate, only, which will not attach to the interest limited to him or take effect out of his own interest but which arises after the donee's own estate has terminated.

3. **SAME**—*what is a power appendant or appurtenant.* A power appendant or appurtenant exists where the donee of the power has an estate in the land and the power is to take effect wholly or in part out of that estate and where the estate created by the exercise of the power affects the estate and interest of the donee.

4. **SAME**—*power in gross, if not coupled with a trust, may be extinguished by the donee.* A power in gross, if not coupled with a trust, may be extinguished by the donee by a release to any person having an estate of freehold in the land.

5. **SAME**—*power appendant or appurtenant may be released or extinguished.* A power appendant or appurtenant may be released or extinguished, and the alienation of his estate by the donee will destroy the power, as it would be a fraud on the alienee if the grantor could thereafter, by exercising the power which is optional with him, derogate from his own grant.

6. **SAME**—*when power to appoint fee is extinguished by donee.* While a power of appointment of the fee is not merged in an estate in fee where such power is given to the donee by the same instrument creating the estate in the donee, yet where the donee of the power subsequently acquires the fee such power of appointment is merged, or at least becomes changed from a power in gross to a power appurtenant, and will be extinguished by a conveyance of the fee by the donee reciting that all power of appointment is relinquished.

APPEAL from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

A. D. CADWALLADER, guardian *ad litem*, for appellants.

COVEY & WOODS, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a decree in partition of the circuit court of Logan county.

Charles Paulus died about April 21, 1916, leaving a last will and testament duly proven and admitted to probate. He left him surviving as his only heirs-at-law his four children, Henry J. Paulus, Louis W. Paulus, Hermina M. Baker and Nettie E. Wilmert. At the time of his death he was seized in fee simple of 1000 acres of land, among which was the land in question, disposed of by the sixth clause of the will and the second paragraph of the first codicil thereto. The sixth clause reads as follows:

"*Sixth*—I give and devise to my beloved daughter Nettie E. Paulus the following described real estate, to-wit: The northwest quarter of section 16 and the northwest quarter of the southwest quarter of said section 16, all in township 18, north, and range 1, west of the third principal meridian, in said Logan county, to have and to hold for the period of her natural life, and after her death I give and devise the remainder in the same to all the lineal descendants she may leave living at her death, *per stirpes* in fee."

The second paragraph of the first codicil reads:

"In said will I have given certain real estate to my daughter Nettie Paulus for life and remainder to her lineal descendants and in default of lineal descendants I have devised the remainder to my lineal descendants living at her death; now by this codicil I desire to so change said will that if said Nettie Paulus die leaving no lineal descendants living at her death, the real estate which is given to said

Nettie Paulus for life is hereby devised to such of my lineal descendants as she, said Nettie Paulus, shall by will appoint, and in default of will and lineal descendants of herself, then said real estate given to her for life shall descend to all of my lineal descendants living at her death, *per stirpes* in fee."

The four children by *mesne* conveyances conveyed their life estates, together with their reversionary interests, to Edward Spatz. These conveyances were held by this court to have destroyed the remainders, which were held to be contingent and therefore destructible. (*Spatz v. Paulus*, 285 Ill. 82.) Spatz thereafter by warranty deed conveyed to Nettie E. Wilmert in fee the tract of land in question here, and she immediately thereafter by warranty deed conveyed the same lands to Spatz, in which deed the following language was used: "The grantor, Nettie E. Wilmert, hereby releases, relinquishes and extinguishes any power of appointment or disposition she may have over said premises under and by virtue of the will of Charles Paulus, deceased, or the codicils thereto, and she further covenants and agrees with said Spatz that she will never, under any circumstances or at any time, exercise any such power of disposition or appointment or otherwise do any act or thing that will in any way cut down, detract from or affect the absolute, indefeasible, fee simple title to said premises which is hereby conveyed to said Spatz." By subsequent *mesne* conveyances Hermina M. Baker, Henry J. Paulus, Nettie E. Wilmert and Louis Paulus became seized of said premises and other lands as tenants in common. The bill for partition herein was thereupon filed and decree entered thereon, finding that said four persons were owners in fee of the lands in question, together with the other lands, and decreeing partition thereof. The chancellor also found and decreed that by the warranty deed of Nettie E. Wilmert, Spatz took the fee simple title to the lands in question, and that all contingent remainders and contingent future interests of

every kind were by merger destroyed, and that any power of appointment existing in Nettie E. Wilmert by virtue of said codicil was released and extinguished.

It is contended by appellants that the chancellor erred in holding that the power of appointment given to Nettie E. Paulus by the will was extinguished by her deed to Edward Spatz; that she did not and could not exercise the power of appointment contained in the codicil by the giving of the deed but that such power could only be exercised by her by means of a will.

This case came before this court in *Spatz v. Paulus, supra*, where it was held that the remainders created by the will of Charles Paulus were contingent remainders, and that therefore the deeds of the life tenants and reversioners extinguished the contingent remainders and vested the fee in the grantee therein. That question, although here raised on assignments of error, was in that case passed upon, and as there the same will was involved and all parties to this suit were parties in that suit and before the court, that case is *res judicata* as to that question.

But it is urged the power of appointment in this case prevented the merger of the life estate with the reversion so as to extinguish the contingent remainders, and that that matter was not passed upon by this court in the case of *Spatz v. Paulus, supra*. The record discloses that such point was not raised in that case, and while the fact that the court did not comment on that feature of the case does not affect the rule with reference to its being *res judicata*, it is clear that if this power be one which may be extinguished by the act of the donee thereof, it would not prevent a merger in case such donee would so act as to extinguish such power. The principal question, therefore, is whether or not the deed of Nettie E. Wilmert extinguished the power of appointment given her by the second paragraph of the first codicil to the will of Charles Paulus. It is evident from the language of her deed that she, in so

far as she was able to do, released, relinquished and extinguished this power of appointment or disposition, and if it be such a power as may be by the donee thereof released and extinguished, such has clearly been done in this case. Again, Nettie E. Wilmert gave her warranty deed to the premises in question, and if the power of appointment given her by the will is such as may be extinguished, she would be estopped under her warranty from exercising the same. We therefore come to the question whether or not the power granted in the codicil is extinguishable.

It is contended by appellants that since the will provides that the power of appointment shall be exercised by will it cannot be exercised in any other way. The question here, however, is not one of the exercise of the power of appointment, but whether or not the same may be extinguished and the exercise thereof avoided by the act of the donee over such power. It follows that authorities cited by appellants in support of their contention have no application.

Powers of appointment have been by some authorities divided into three classes: First, collateral powers; second, powers in gross; and third, powers appurtenant or appendant. A power collateral is one in which a power of appointment is vested in one not interested in the property made the subject thereof. (1 Tiffany on Real Prop. sec. 291.) A power in gross is one in which the donee having an interest in the land is to create by appointment an estate, only, which will not attach to the interest limited to him or take effect out of his own interest but which arises after the donee's own estate has terminated, as where a life estate is given to A with power to appoint by will, such power not being designed or intended to create an estate by appointment out of the estate held by the donee but subsequent to the termination of the donee's estate is held to be power in gross. (1 Sugden on Powers,—3d Am. ed.—107.) A power appendant or appurtenant is that power existing where the donee of the power has an estate in the

land and the power is to take effect wholly or in part out of that estate, and the estate created by its exercise affects the estate and interest of the donee of the power. (Farwell on Powers, 8.) Appendant and appurtenant powers are annexed to the estate of the donee, and when created are to be executed out of and must be concurrent with and have their being and continuance, at least for some part, out of the estate of the donee. (Powell on Powers, 10.) A power simply collateral cannot be suspended or extinguished by any act on the part of the donee with respect to the land, nor can it be released by him except when it is for his own benefit, as a power to charge a sum of money on the land for himself. (1 Tiffany on Real Prop. sec. 291; Sugden on Powers, 49.) Powers in gross, if not coupled with a trust, may be released by the donee to any person having an estate or freehold in the land. (Sugden on Powers, sec. 82; 5 Gray's Cases, 328; Tiffany on Real Prop. sec. 291; Farwell on Powers, sec. 12.) A power appendant or appurtenant may be released or extinguished. (Washburn on Real Prop. sec. 1668.) Where lands are limited to such uses as A shall appoint and in default of such appointment such lands shall go to A and his heirs, he may dispose of the lands either by the exercise of the power or by a conveyance of his estate. If he exercises the power the estate limited to him in default of the appointment is destroyed, but if he conveys his estate the power is extinguished. (Williams on Real Prop.—17th ed.—446.) Where the donee of the power has an estate in land, the exercise of which power would necessarily affect his estate, (as where a tenant in fee has power to appoint others in fee,) such donee has a power appendant or appurtenant, and the alienation of his estate will destroy the power, since it would be a fraud on the alienee if the grantor could thereafter, by exercising the power which is optional with him, derogate from his own grant. (1 Tiedeman on Real Prop. 642.) In 2 Coke on Littleton (Butler

& Hargrave's notes, 243*b*) the rule is thus stated: "As to powers relating to the estate of the donee of the power in the land: Such of those powers as are in the nature of powers appendant to estate may, it is agreed, be extinguished by the release, feoffment, fine or common recovery of the donee of the power. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seized, for whoever has any estate in the land may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid or to do anything in derogation from his own grant. Any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the powers appendant to that estate."

Applying these rules to the case at bar, it is evident that the power taken by Nettie E. Wilmert under the will was a power in gross not coupled with a trust, for by the terms of said codicil it is provided that "in default of will and lineal descendants of herself" the real estate was to go to the lineal descendants of the testator. The appointment was of an estate not out of her estate but to commence after the termination of her estate. The power thereby given was a power in gross not coupled with a trust, which, as we have seen under the authorities, may be extinguished by the donee. 22 Am. & Eng. Ency. of Law, (2d ed.) 131; 1 Sugden on Powers, (3d ed.) secs. 82, 158; Tiffany on Real Prop. sec. 291; *McFall v. Kirkpatrick*, 236 Ill. 281.

As we have seen, Nettie E. Wilmert conveyed her life estate, together with her reversionary interest, to Edward Spatz, which, as was held in the case of *Spatz v. Paulus*, *supra*, vested the fee in Spatz and extinguished the contingent remainder. Spatz thereafter by warranty deed conveyed the fee in the land in question to Nettie E. Wilmert. The deed by which she conveyed her life estate and rever-

sionary interest to Spatz, while containing a recital that it was the intention to extinguish all contingent remainders and future interests, contained no recital as to the relinquishment or extinguishment of her power of appointment. Assuming, therefore, that such power had not been extinguished when she became vested with the fee to the lands in question by the deed of Spatz to her, we have a situation where she is the owner of the fee subject to this power of appointment. The rule is, that while a power of appointment is not merged in an estate in fee where such power of appointment of the fee is given to the donee by the same instrument, yet where the donee of the power acquired the fee simple subsequently, such power of appointment is merged. (Tiffany on Real Prop. sec. 291; Farwell on Powers, 31.) Whether or not this be the true rule, it is evident that the character of the power thereby became changed from a power in gross to a power appurtenant, in that the exercise of that power would be to appoint an estate out of the fee of the donee of the power. (*McFall v. Kirkpatrick*, *supra*.) In either event said power may become extinguished by the act of the donee, and when Nettie E. Wilmert, after receiving the fee to said property, conveyed the same by warranty deed, with the recital therein that she relinquished, released and extinguished any power of appointment that she may have had, and covenanted that she would never, under any circumstances, exercise such power of appointment, said power must be held to be extinguished. 1 Sugden on Powers, (8th ed.) 74; 2 Chance on Powers, 3149; *McFall v. Kirkpatrick*, *supra*.

As we have seen, it appears that subsequent to the warranty deed of Nettie E. Wilmert to the premises in question, the appellee, Hermina M. Baker, and Henry J. Paulus, Nettie E. Wilmert and Louis Paulus, took title to the property in question, together with other lands, by *mesne* conveyances as tenants in common, and it follows from the views herein expressed that they took as such tenants in

common the fee simple title thereto, free from all incumbrances and not affected by the power of appointment in question herein, and the chancellor did not err in so finding and decreeing.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(No. 12556.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. HARRY JOHNSON, Plaintiff in Error.

Opinion filed June 18, 1919.

1. CRIMINAL LAW—*practice of submitting propositions of law is inapplicable where criminal case is tried without a jury.* The practice of submitting propositions of law to the court is inapplicable to the trial of a criminal case before the court without a jury.

2. SAME—*exercise of police power is not unconstitutional because it restrains liberty of citizens.* The police power of a State is an attribute of sovereignty existing without any reservation in the constitution, and as it is based on the principle of the greatest good to the greatest number and is founded on the duty of the State to provide for the safety and good order of society, the mere fact that a proper law exercising such power restrains the liberty of citizens or causes an innocent person to suffer does not render it unconstitutional.

3. SAME—*exercise of police power is presumed to be valid.* It is for the legislature to determine when the conditions exist which call for the exercise of the police power, and when the legislature has acted the presumption is that the act is a valid exercise of such power.

4. SAME—*statutes punishing wrongdoing without criminal intent are valid under the police power.* The constitution does not require that *scienter* be a necessary element of a law fixing punishment for the doing of an act where the offense is *malum prohibitum*, and the fact that such law requires allegation or proof of criminal intent does not render it invalid when passed in the exercise of the police power.

5. SAME—*what is essence of offense in section 15b of Motor Vehicle act.* By section 15b of the Motor Vehicle act, providing

for fine or imprisonment of any person having a motor vehicle from which the manufacturer's number or mark has been removed or changed, the essence of the offense consists in the "purpose of concealing or destroying the identity" of the vehicle.

6. SAME—*section 15b of Motor Vehicle act does not deprive defendant of property without due process of law.* Section 15b of the Motor Vehicle act, providing for fine or imprisonment of any person having a motor vehicle from which the manufacturer's number has been removed, does not deprive the defendant of his property without due process of law nor deny him the equal protection of the laws.

WRIT OF ERROR to the Municipal Court of Chicago;
the Hon. JOHN RICHARDSON, Judge, presiding.

FYFFE, RYNER & DALE, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, of counsel,) for the People.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

The plaintiff in error, Harry Johnson, was convicted in the municipal court of Chicago of a violation of section 15b of the Motor Vehicle law (Hurd's Stat. 1917, p. 2576,) and was sentenced to pay a fine of \$200 and costs. He prosecutes this writ of error to reverse the judgment and sentence of the court.

The facts are not in dispute. The plaintiff in error was the general manager of the Commercial Car Unit Company, whose place of business is located in Chicago. The company was engaged in the business of attaching truck units to pleasure car units and making of them commercial trucks. On January 5, 1918, the Ford Motor Company delivered six new Ford cars to the premises of the Commercial Car Unit Company. The plaintiff in error thereupon ordered one of his workmen to change the motor numbers on these cars. There were seven figures in each of the numbers, which had been stamped on the left-hand side of

each of these motors with a steel die by the Ford Motor Company. Following directions of plaintiff in error the workman changed the motor numbers of these new Ford cars by hammering out the third and fourth figures and stamping different figures over the same spots. The first two and last three figures in the number were not touched. No explanation is made for changing the numbers.

The only question before us is the constitutionality of said section 15*b* of the Motor Vehicle law, which provides: "Any person having in his or her possession any motor bicycle or motor vehicle from which the manufacturer's serial number, or any other manufacturer's trade or distinguishing number or identification mark, has been removed, defaced, covered or destroyed for the purpose of concealing or destroying the identity of such motor bicycle or motor vehicle shall be liable to a fine of not more than two hundred dollars (\$200) or imprisonment in the county jail for a period not to exceed six (6) months, or both."

It is urged that this section of the statute violates section 2 of article 2 of the constitution of this State as well as section 1 of the fourteenth amendment of the Federal constitution, in that it deprives the defendant of his liberty and property without due process of law and denies to him the equal protection of the laws. It is contended that the statute is an arbitrary and unreasonable exercise of the police power of the State.

At the close of all the evidence plaintiff in error submitted eight propositions of law, which he asked the court to hold to be the law as applicable to the case. The court marked each of the propositions "Refused." It will be unnecessary to discuss this action of the court, for the reason that we have held that the submission of propositions of law to the court is inapplicable to a criminal case where the same is tried by the court without a jury. *People v. Taylor*, 279 Ill. 481; *Jacobs v. People*, 218 id. 500; *Chicago, Wilmington and Vermilion Coal Co. v. People*, 214 id. 421.

Motions for a new trial and in arrest of judgment were made and overruled.

The police power of a State is an attribute of sovereignty and exists without any reservation in the constitution, being founded on the duty of the State to protect its citizens and provide for the safety and good order of society. The mere fact that a law restrains the liberty of citizens of a State does not render it unconstitutional. In *Hawthorn v. People*, 109 Ill. 302, we discussed at length the powers of the legislature, and an elaborate repetition of that discussion would serve no good purpose here. We have held, in a long line of decisions, where the authorities have been collected and discussed, that it is for the legislature to determine when the conditions exist calling for the exercise of police power to meet existing evils, and when the legislature has acted the presumption is that the act is a valid exercise of such power. *People v. Stokes*, 281 Ill. 159; *People v. Henning Co.* 260 id. 554; *People v. Ellerdine*, 254 id. 579.

It is contended by plaintiff in error that one might be guilty under this act by having a car in his possession from which the numbers had been removed without his knowledge. The constitution does not require that *scienter* be a necessary element of any law where an offense is *malum prohibitum*. One may violate the law without any intent on his part to do so. (*People v. Nylin*, 236 Ill. 19; *People v. Spoor*, 235 id. 230.) Various statutes of this State punishing the doing of acts without requiring allegation or proof of criminal intent upon the part of the doer have been upheld on the ground that they were a valid exercise of the police power. (*Maguire v. People*, 219 Ill. 16; *American Car Co. v. Armentraut*, 214 id. 509; *Farmer v. People*, 77 id. 322; *Mapes v. People*, 69 id. 523; *Eells v. People*, 4 Scam. 498.) In other jurisdictions laws enacted by the legislatures punishing the doing of acts without intent or guilty knowledge on the part of the doer have been

held to be valid enactments. (*People v. Hatinger*, 174 Mich. 333; *Commonwealth v. Mixer*, 207 Mass. 141.) Laws can not be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is, "the greatest good to the greatest number." The essence of the offense contemplated by section 15b of the Motor Vehicle law consists in the "purpose of concealing or destroying the identity" of the vehicle. If it could be shown that the possession of an automobile with mutilated numbers was not for the "purpose of concealing or destroying the identity" of such automobile, we apprehend that a prosecution, not to say a conviction, would be unlikely. We feel that there is no merit in the contention that the enactment of this statute was not a valid exercise of the police power of the State. *People v. Fernow*, 286 Ill. 627.

As to the objection to the validity of the statute, to the effect that it deprives the defendant of his liberty and property without due process of law and denies him the equal protection of the laws, it is sufficient to say that we have had occasion to discuss these constitutional limitations at length on prior occasions, and a reference to those decisions, without discussing them, will show that there is no merit in this contention. (*Burdick v. People*, 149 Ill. 600; *Munn v. People*, 69 id. 80.) We are unable to see how plaintiff in error was deprived of any "liberty or property without due process of law." The act does not deprive him of the use of the cars. He is merely prohibited from changing the numbers for the purpose of destroying the means of identification. What loss this will cause him is not revealed. The value of the act for the protection of the property rights of the citizens in general is too patent to need discussion.

We think that the act is a valid exercise of legislative power and therefore affirm the judgment of the municipal court.

Judgment affirmed.

(No. 12506.—Judgment affirmed.)

THE PEOPLE *ex rel.* John A. Coleman, County Collector,
Defendant in Error, *vs.* NORMAN E. LEAVENS *et al.*
Plaintiffs in Error.

Opinion filed June 18, 1919.

1. DRAINAGE—*a judgment may be collaterally attacked where court is without jurisdiction.* Where the court in an original proceeding to levy a drainage assessment is without jurisdiction of the subject matter, a judgment against land in such proceeding is void and may be attacked in a collateral proceeding without resorting to an appeal or writ of error.

2. SAME—*when judgment cannot be collaterally attacked.* Under the Levee act of 1879 the county court is vested with authority to hear and determine petitions for the organizing, improving, extending and protection of drainage districts, and an objection that a judgment in such proceeding was erroneous because the petition gave discretionary power to the district engineer cannot be raised in a collateral proceeding to collect a delinquent assessment.

3. JURISDICTION—*jurisdiction of subject matter does not depend on correctness of decision rendered.* Jurisdiction of the subject matter is authority to hear and decide a cause and does not depend on the correctness of the decision rendered.

WRIT OF ERROR to the County Court of Carroll county;
the Hon. R. J. CARNAHAN, Judge, presiding.

CHARLES C. McMAHON, JOHN D. TURNBAUGH, and
JOHN L. BREARTON, for plaintiffs in error.

F. J. STRANSKY, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause comes on a writ of error to the county court of Carroll county to review the judgment of said court against the lands of the plaintiffs in error for a delinquent annual drainage assessment levied by the Savanna-York Drainage District, located in said county. This district was organized in 1906. It appears that the drainage

commissioners of the district on November 13, 1916, filed their petition in said court under section 37 of the Levee act of 1879, in which petition changes and new construction were asked, also authority to raise by assessment the necessary money to defray the expense thereof. Objections were filed to that proceeding by the plaintiffs in error, and it is admitted that all the plaintiffs in error here appeared in the county court on the hearing of the petition. It is also admitted here that they filed and urged against granting the petition and against the confirmation of the assessment roll the same objections here urged,—that is, that the county court is without jurisdiction to enter any order on the petition or to authorize the commissioners to make such extensions and repairs or to confirm the assessment roll, for the reason that the petition, and the plans, profiles and specifications filed therewith and made a part thereof, granted certain discretionary powers to the district engineer; that since the judgment on the petition was void it could not become the basis of a judgment for a delinquent annual assessment; that the county court was without jurisdiction of the subject matter of the petition.

It is a well settled rule of law that where the court in the original proceeding is without jurisdiction of the subject matter, a judgment against land in such proceeding is void and may be attacked in a collateral proceeding without resorting to an appeal or writ of error. (*People v. Sangamon and Drummer Drainage District*, 253 Ill. 332; *Donner v. Highway Comrs.* 278 id. 189.) It is admitted that the petition was filed under section 37 of the Levee act of 1879, and that the petition contained the necessary statement of the commissioners as provided by said section and contained plats and profiles as provided thereby, it being contended, however, that the specifications gave the engineer discretion to determine numerous questions concerning said improvement. Jurisdiction of the subject matter is authority to hear and decide a cause and does not depend

on the correctness of the decision entered. *People v. Leonard*, 279 Ill. 159; *People v. Zimmer*, 252 id. 9; *Miller v. Rowan*, 251 id. 344; *People v. Harper*, 244 id. 121; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Polcat Drainage District*, 213 id. 83; *People v. Talmadge*, 194 id. 67.

In the case of *People v. Leonard*, *supra*, a petition was filed under section 59 of the Levee act, and the objection was urged that the court was without jurisdiction to hear the same. It was said in that case that while the petition was filed under the wrong section of the statute and the levy of the assessment was void, "it does not follow that the court was without jurisdiction to make any order. The petition purported to be filed under section 37. The court had jurisdiction of the general subject of assessments upon lands of the district for additional work or the completion of any work already commenced within any drainage district to insure the protection or drainage of the lands in the district. The petition for such an assessment gave it jurisdiction over the particular case. The petition asked for an order which it was erroneous for the court to make, but the general subject was within the jurisdiction of the court. Its order, therefore, however erroneous, was not subject to collateral attack. The remedy of the appellees was a writ of error. They cannot avail of the error on an application for judgment against their lands for the installments of the special assessments."

In *Miller v. Rowan*, *supra*, the distinction between the jurisdiction of the subject matter and an erroneous exercise of jurisdiction is laid down, as follows: "A judgment or decree is not binding upon anyone unless the court rendering the same had jurisdiction of the parties and the subject matter of the cause. The court did have jurisdiction of the parties, and the appellant, who is disputing the binding effect of the decree, was one of the complainants. Jurisdiction of the subject matter is the power to adjudge

concerning the general question involved, and if a bill states a case belonging to a general class over which the authority of the court extends, the jurisdiction attaches and no error committed by the court can render the judgment void. If the court has jurisdiction, it is altogether immaterial, when the judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been. The judgment cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. Such a judgment is binding on the parties and on every other court unless reversed or annulled in a direct proceeding and is not open to collateral attack. If there is a total want of jurisdiction in a court its proceedings are an absolute nullity and confer no right and afford no protection but will be pronounced void when collaterally drawn in question.—*Buckmaster v. Carlin*, 3 Scam. 104; *Swiggart v. Harber*, 4 id. 364; *People v. Seelye*, 146 Ill. 189; *Clark v. People*, 146 id. 348; *O'Brien v. People*, 216 id. 354; *People v. Talmadge*, 194 id. 67.”

Under the statute the county court is vested with authority to hear and determine petitions for the organizing, improving, extending and protection of drainage districts and lands therein, by virtue of the Levee act of 1879. The county court had jurisdiction of the subject matter in this case and had authority to hear and determine the matter set out in the petition filed in November, 1916. That its judgment on said petition may have been erroneous is a matter not open for discussion on collateral attack. As admitted in this record, all of the objectors here appeared and filed this same objection in the proceedings on the petition and have had their day in court. Their remedy was to have sought a review of the judgment on the petition by appeal or a writ of error. They are precluded from having such review in this collateral proceeding.

The judgment of the county court will be affirmed.

Judgment affirmed.

(No. 11644.—Reversed and remanded.)

TALITHA H. KELLNER *et al.* Plaintiffs in Error, *vs.* EMMA FINKL *et al.* Defendants in Error.

Opinion filed June 18, 1919.

PARTITION—*pleas in abatement cannot be pleaded in a partition suit—costs.* Under section 21 of the Abatement act, prohibiting pleas in abatement in a partition suit, if two suits in partition are begun by different tenants in common in the same court one cannot be pleaded in abatement of the other, but the court may stay one suit or it may consolidate the suits, and the costs, including solicitor's fees, may be equitably apportioned among the parties in accordance with the statute.

THOMPSON, J., dissenting.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

VINCENT D. WYMAN, HARRY C. KINNE, and CHARLES E. CARPENTER, for plaintiff in error Talitha H. Kellner.

H. W. MASTERS, and EDGAR L. MASTERS, for defendant in error George L. Herbert.

O'DONNELL & O'DONNELL, for defendants in error George K. Schmidt and Charles J. Schmidt.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

Under the will of Kaspar G. Schmidt the title to certain real estate in Cook county vested in his fifteen grandchildren who were living on May 15, 1915, and early in the morning of that day a bill was filed in the superior court by the son of one of his daughters for the partition of the real estate, and an hour or two later another bill for the

same purpose was filed in the same court by the plaintiffs in error, who are the four children of another daughter. A writ of *certiorari* was allowed to bring before us the record of the Appellate Court, which affirmed a decree dismissing the second bill.

All the grandchildren were parties to both bills. Summons was served on some of the defendants in each case on May 15, and in the first case, which was No. 315,815, all were served in time for the June term. In the second case (No. 315,816) all were served by May 17, but George L. Herbert, who was the complainant in the first bill and a defendant in the second, was a resident of Michigan and was served there with a copy of the bill, so that the service was to the July term, since the June term began in less than thirty days after May 17. All of the defendants in No. 315,816 filed pleas, which, in substance, averred the filing of the bill in No. 315,815, praying the same relief in regard to the same subject matter to which the parties were the same as in No. 315,816. The pleas further averred that the said bill was still pending and undetermined, and demanded the judgment of the court whether the defendants ought to be compelled to make any answer to the bill in No. 315,816. The plaintiffs in error moved to strike the pleas from the files, and the motion was overruled. They moved to set down the pleas, except that of George L. Herbert, for hearing as a matter of fact. The motion was denied and the court ordered the pleas set down for argument, and upon such argument ordered the pleas allowed and dismissed the bill.

Section 21 of the Abatement act provides that no plea in abatement shall be received in any suit for partition, nor shall such suit abate by the death of any tenant. It was said in *Hopkins v. Medley*, 97 Ill. 402, with reference to this section, that it is almost a literal copy of section 3 of chapter 31 of 8 and 9 William III; that in construing this section of the English statute it is uniformly held that no

plea in abatement is admissible in partition proceedings, and that in adopting it the legislature must be presumed to have intended to adopt it with the construction already given it by the English courts. It was further said that the language of the section is clear and unequivocal, and it is difficult to see how any other construction could have been placed upon it, and a plea in abatement in a partition suit for want of parties was held properly stricken from the files. A prior suit in equity pending may, in general, be pleaded to the prosecution of a subsequent suit between the same parties upon the same equity, but since the statute prohibits pleas in abatement in a partition suit, the motion of the plaintiffs in error to strike the pleas should have been sustained.

Any tenant in common may maintain a suit for partition in any court of competent jurisdiction. If two or more suits are begun by different tenants in common in the same court one cannot be pleaded in abatement of the others. Two decrees in partition will not be entered but the court may control the suits by consolidating them and staying proceedings in one or more of the causes, and thereby grant the relief sought promptly, without delaying any party in the prosecution of his rights. On the final hearing the costs, including the solicitor's fee, may be apportioned among the parties in interest, so that each shall pay only his or her equitable portion thereof in accordance with the statute. The party or parties filing the first bill will be entitled to have the solicitor's fee taxed to pay his or their solicitor, provided his or their suit be properly prosecuted and no proper defense be made to the same. On such final hearing any subsequent bill or bills may be dismissed at the costs of the parties filing the same, if no good reason for the filing of the same shall appear. In this case the two suits were pending in the same court, and an order should have been made for their consolidation and disposition as here suggested.

The judgment of the Appellate Court and the decree of the superior court will be reversed and the cause will be remanded to the latter court, with directions to strike the pleas from the files.

Reversed and remanded, with directions.

Mr. JUSTICE THOMPSON, dissenting.

(No. 12717.—Reversed and remanded.)

E. G. HUTSON, Appellant, vs. C. B. HUDELSON, Appellee.

Opinion filed June 18, 1919.

1. MORTGAGES—*error in decree for foreclosure can be corrected only in direct proceeding.* Where the court has jurisdiction of the subject matter and the parties in a proceeding for foreclosure, any error in the decree, whether in the amount or in any other respect, can be corrected only by a direct proceeding to reverse it.

2. JUDICIAL NOTICE—*when fact that court has judicial notice will not charge individuals with the same knowledge.* The circuit court sitting in a certain county will take judicial notice that a certain city is the county seat of the county, and it will also take judicial notice of the official character of the officers of that county; but this rule does not go to the extent of holding that every individual who happens to be within the limits of the county has the same knowledge.

3. PROCESS—*defendant is entitled to definite notice in summons where he is to appear.* The defendant has a right to know definitely from the summons itself where he is required to appear when served, and a summons issued by a justice of the peace with a venue laid in the "State of Illinois, county," requiring the defendant to appear at the office of the justice "in Benton, in said county," does not give sufficient notice and confers no jurisdiction of the person of the defendant.

4. RES JUDICATA—*a former adjudication must be pleaded in equity.* Where a former adjudication of a controversy is relied upon as a defense in equity it must be pleaded when an opportunity has been afforded to the defendant to plead it.

5. CLOUD ON TITLE—*laches cannot be charged against owner in possession for failure to remove cloud.* Laches cannot be charged against the owner of property in the undisturbed possession of it, for his failure to engage in litigation to remove unfounded claims as clouds upon his title.

6. *SAME—void sheriff's deed may be removed as a cloud—redemption.* A court of equity will entertain a bill to remove a void sheriff's deed as a cloud upon the title of the owner of real estate, but where the purchaser at the sale has in good faith redeemed from a prior foreclosure sale, the owner will be required, before he can have the void deed set aside, to reimburse the purchaser for the amount he paid to redeem from the foreclosure sale.

APPEAL from the Circuit Court of Franklin county; the Hon. JULIUS C. KERN, Judge, presiding.

D. G. THOMPSON, and W. P. SEEGER, for appellant.

W. F. DILLON, and THOMAS J. LAYMAN, for appellee.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

E. G. Hutson filed a bill in the circuit court of Franklin county against C. B. Hudelson, which the court upon a hearing dismissed for want of equity, and the complainant has appealed.

The bill alleged that the appellant was in the possession of twenty acres of land, and that on June 4, 1909, the land was sold under a decree of foreclosure; that on February 17, 1910, the First National Bank of Benton, as the assignee of a mortgage subsequent to the one foreclosed, redeemed from the sale and afterward procured a decree of foreclosure of the junior mortgage, in which it was decreed that the complainant should be reimbursed for the redemption money out of the proceeds of the sale of the land, the total amount of the second decree of foreclosure being \$1605.69. The land was sold by the master to the bank under the second decree of foreclosure. The bill avers that on November 14, 1908, W. F. Dillon and others obtained a pretended judgment against the appellant for \$97.17 and costs before C. C. Payne, a justice of the peace of Franklin county. Without any affidavit being made, as required by statute, an execution was issued on November 18, 1908, which was not served on the appellant but was returned on

the next day "not satisfied," and on November 21, 1908, a transcript of the judgment was filed in the office of the circuit clerk and an execution was issued thereon on August 8, 1911; that the sum of \$1770.64 was paid to the master in chancery to redeem from the sale under the decree of foreclosure and the sheriff levied the execution upon the land, which was sold by the sheriff under the execution to the appellee. It is further averred that the appellee was about to prosecute an action of forcible detainer against the appellant for the possession of the land. The bill was afterward amended, and it was averred that the transcript of the judgment of the justice of the peace was void for the reason that the summons did not show any venue and conferred no jurisdiction on the justice of the peace. The amended bill prayed for an injunction to restrain the defendant from prosecuting the forcible detainer suit; that the sheriff's sale under the execution issued on the transcript of the judgment of the justice of the peace, and the deed made pursuant to such sale, be set aside as clouds on the appellant's title; that the title to the land be quieted in the appellant, and that in any event the appellant might have the right to redeem from the sale under the execution. The answer of the defendant relied on the proceedings set up in the bill, which it denied were irregular and void but averred were legal, and that by virtue of them the defendant was vested with the fee simple of the premises in controversy. In regard to the proceedings under the judgment of the justice of the peace, the answer denied that they were void and averred "that the Appellate Court for the Fourth District of Illinois has adjudicated and held the said proceedings to be valid, and that said adjudication of the said Appellate Court has never been annulled, reversed or set aside and is still in full force and effect."

Objections were stated in the bill, and are relied on in the argument of the appellant, to the redemption from the sale under the decree of foreclosure of the first mortgage,

and questions are also raised in regard to the right of homestead and the different descriptions of the property in the various instruments, but these objections and questions are all immaterial. The erroneous proceedings, if there were any, occurred prior to the decree of foreclosure of the second mortgage, and the complainant cannot in this suit go back of that decree to correct errors which the court may have committed in rendering it. The second mortgage released the right of homestead. The court had jurisdiction of the subject matter and the parties, and any error in the decree, whether in the amount or in any other respect, can be corrected only by a direct proceeding to reverse it.

The appellant contends that the transcript of the judgment before the justice of the peace did not authorize the issue of an execution by the clerk of the circuit court, and that therefore the redemption and sale under the execution and the sheriff's deed are void. The transcript shows the following summons:

"STATE OF ILLINOIS, {
.....County. } ss.

"The People of the State of Illinois, to any constable of said county.—Greeting:

"You are hereby commanded to summon E. G. Hutson to appear before me, at my office in Benton, in said county, on the 14th day of November, A. D. 1908, at 9 o'clock A. M., to answer the complaint of W. F. Dillon, W. B. Martin, W. W. McCreery, F. H. Stamper, A. L. Copple and W. H. Moore for a failure to pay them a certain demand not exceeding two hundred dollars, and hereof make due return as the law directs.

"Given under my hand and seal this 9th day of November, A. D. 1908.

C. C. PAYNE, (Seal)
Justice of the Peace."

Upon the summons appears the following return:

"Personally served the within writ by reading the same to the within named defendant, E. G. Hutson, this 11th day of November, A. D. 1908.

W. R. STEWART, *Constable."*

A judgment was rendered by default.

In *Orendorff v. Stanberry*, 20 Ill. 89, a summons bearing the venue of Tazewell county was issued to the sheriff

of Logan county commanding him to summon the defendants to appear before the circuit court of said county on the first day of the next term thereof, to be holden at the court house in the city of Pekin on the second Monday of the month of October next. The sheriff of Logan county returned the writ executed by reading to the defendants and a judgment by default was rendered against them. The judgment was reversed, the court holding that the service on the defendants in Logan county was void; that the defendants had a right to know certainly when and where they were required to appear when summoned, and that the language of the writ left it doubtful which county was intended. A like decision was rendered in a similar case in *Gill v. Hoblit*, 23 Ill. 473, and the validity of the rule was recognized in *Hall v. Davis*, 44 Ill. 494, though the writ in that case was different and the validity of the summons and service was upheld. So in *Moore v. Neil*, 39 Ill. 256, a notice by publication in a newspaper published in Shelby county that an administrator would present a petition to sell land to pay the debts of his intestate at the next term of the Shelby circuit court, to be holden at the court house in Shelbyville on the fourth Monday in the month of May next, was held to be a sufficient designation of the county. In the latter case there was no confusion as to the county, no mention of two counties, and the designation of the Shelby circuit court to be holden at the court house in Shelbyville indicated the court, and the place of holding it, in terms which could apply to no other court.

The present case is governed by the rule laid down in *Orendorff v. Stanberry* and *Gill v. Hoblit*, *supra*. There is no reference in the summons to any county in the State, and it required the defendant to appear at the office of the justice of the peace in Benton, in said county. It is true that the court sitting in Franklin county will take judicial notice that the city of Benton is the county seat of Franklin county, and it will also take judicial notice of the

official character of the officers of that county, but this rule does not go to the extent of holding that every individual who happens to be within the limits of the county has the same knowledge. It does not appear that the summons was served upon the defendant in Franklin county; it is not directed to the sheriff or any constable of Franklin county; it does not notify him to appear at any place in Franklin county; it does not even notify him to appear at the city of Benton. It requires him to appear at the office of C. C. Payne, in Benton, and Benton may be a township in any one of the counties of the State. The defendant has a right to know definitely and with certainty, from the summons itself, where he is required to appear when served, without further inquiry. This summons did not give such notice, and the justice of the peace therefore acquired no jurisdiction of the person of the defendant and the judgment rendered by him was of no effect.

The appellee contends that the question of the validity of the judgment of the justice of the peace and of the transcript, the execution, sale and sheriff's deed has been adjudicated between the appellant and the appellee. When a former adjudication of a controversy is relied upon as a defense in equity it must be pleaded when an opportunity has been afforded to the defendant to plead it. (*Williams v. Williams*, 265 Ill. 64.) The bill as amended averred that the transcript of the judgment was void for the reason, among others, that the summons did not show any venue and conferred no jurisdiction on the justice of the peace, and the answer averred that the Appellate Court for the Fourth District of Illinois had adjudicated and held the proceedings to be valid. The evidence introduced to sustain the answer in this respect was an opinion of the Appellate Court in the forcible entry and detainer suit against the appellant in which the appellee had been defeated in the circuit court. No record or judgment of the Appellate Court was introduced in evidence, though the opinion indicates

that the judgment of the circuit court was reversed and the cause was remanded for a new trial. The questions considered in the opinion and determined adversely to appellant here were an objection to the sufficiency of the transcript for the reason that execution was issued by the justice of the peace on the fourth day after the judgment was rendered, while the transcript failed to show that the oath required by the statute to authorize the issue of an execution before the expiration of twenty days from the date of the judgment had been made and that the sheriff's deed was executed prior to the expiration of fifteen months from the date of the master's sale. If the opinion may be regarded as any evidence of the judgment of the Appellate Court, it indicates merely that the Appellate Court adjudged that there was error in the proceedings of the circuit court in the trial of the forcible entry and detainer suit and that the cause should be remanded to the latter court for a new trial. There was therefore no judgment as to the rights of the parties. These were dependent upon the result of a new trial. A transcript of the record of the circuit court appears in the record, which shows that the appeal in the forcible entry and detainer suit was afterward dismissed in the circuit court and a *procedendo* was awarded, but neither the judgment of the circuit court nor that of the justice of the peace is alleged in the answer, and this evidence has no bearing on the issue made by the pleadings.

The appellee insists that the appellant's delay in filing his bill constituted such *laches* as to be a waiver of the irregularities complained of and barred him of the right to any relief. The sale under the transcript was made on September 2 and the sheriff's deed on November 3, 1911. The bill was filed November 15, 1912. In the meantime the appellant had been in the undisturbed possession of the property, as he had been for many years before, and he was under no obligation to take any steps to remove the cloud

from his title so long as his possession was undisturbed. *Laches* cannot be charged against the owner of property in the undisturbed possession of it, from his failure to engage in litigation to remove unfounded claims as clouds upon his title. *Shaw v. Allen*, 184 Ill. 77; *Boyd v. Boyd*, 163 id. 611; *Newell v. Montgomery*, 129 id. 58; *Orthwein v. Thomas*, 127 id. 554.

The appellee relies upon the rule that a court of equity will not set aside a judgment for want of service of process unless it is shown that the complainant has a valid defense to the action in which the judgment was rendered. This principle is well recognized, and the reason of it is that a court of equity will not take away from a party a legal advantage which he has acquired without fraud, as a means of securing a just debt, in favor of a party who does not deny that he owes the debt but claims only the right to defend against a claim to which he has no defense. (*Wright v. Simpson*, 200 Ill. 56.) It is equally clear that a court of equity will entertain a bill to remove a void sheriff's deed as a cloud upon the title of the owner of real estate. (*Shaw v. Allen*, *supra*.) While the complainant has no right in equity to have the judgment set aside without showing a defense to the cause of action, he has a right in equity to have the cloud upon his title to real estate, caused by the existence of the void sheriff's deed, set aside. He will, however, be required to do equity and to re-pay to a purchaser in good faith at the void execution sale who is in possession of the real estate and has paid an existing incumbrance on the land, the amount which the purchaser has paid to remove the incumbrance before he can recover the possession. (*Hutson v. Wood*, 263 Ill. 376.) The sale under foreclosure was an incumbrance upon the appellant's title, which was about to ripen into a title and entirely deprive him of the ownership of the land. By reason of the redemption that incumbrance has been removed through the sale to the appellee, though the purchaser has acquired no

title. The appellant, coming into a court of equity for relief, will be required to do equity, and before he can have the title of the appellee, who purchased in good faith, decreed to be void, he will be required to reimburse the appellee for the amount of the purchase money which went to the payment of the prior incumbrance on the land. The appellant will therefore be permitted to redeem from the sale to the appellee by the payment of the amount which was paid to the sheriff for the redemption from the previous sale, with interest from the date of the payment to the sheriff to the date of the payment by the appellee.

The decree will be reversed and the cause remanded to the circuit court, with directions to refer the cause to the master to state an account charging the appellant with \$1770.64, the amount paid for the redemption from the foreclosure sale, with interest from August 8, 1911, together with all taxes and special assessments, if any, on the premises paid by the appellee, with interest from the date of such payments, and the additional value, if any, added to the premises by reason of any permanent improvements which the appellee may have made thereon. The appellee will be charged with all rents and profits received by him from the premises. Upon the coming in of the master's report the court will ascertain the balance with which the appellant is chargeable in accordance with the foregoing directions, and will enter a decree that unless such balance, with interest thereon, be paid by the appellant to the appellee within ninety days from the entry of such decree the appellee will be entitled to a decree dismissing the bill for want of equity, and if such payment is not made within ninety days the court will enter such decree. If such payment shall be made within ninety days the court will enter a decree granting the relief prayed in the original bill. In any event the decree will be at the costs of the appellant.

Reversed and remanded, with directions.

(No. 12720.—Reversed and remanded.)

EDNA L. MEINS *et al.* Appellants, *vs.* LIZZIE MEINS *et al.*
Appellees.

Opinion filed June 18, 1919.

1. *WILLS*—*simple devise of land will convey fee unless contrary intent is shown.* Under section 13 of the Conveyances act a simple devise of land without any words of inheritance will convey an absolute estate in fee, unless a clear intention to limit or qualify the estate granted is shown in other parts of the will.

2. *SAME*—*any part of will may show intention to limit fee devised.* While it is the disposition of courts to adopt such a construction as will give an estate of inheritance to the first devisee, if it is clearly shown by any other clause or part of the will that the testator intended to limit the fee granted in a particular clause such intention must prevail.

3. *SAME*—*principal rule of construction is to ascertain and give effect to intention of testator.* The intention of the testator, gathered from the whole will and all its parts, must govern in the construction of a will, and every clause and provision, if possible, should have effect given to it according to such intention.

4. *SAME*—*later clause will modify former provision.* A later clause of a will, when repugnant to a former provision, is to be considered as intending to modify or abrogate the former.

5. *SAME*—*when devise of fee is limited by subsequent clause.* Where a testator devises all his property, both real and personal, to his wife, and in the next two clauses bequeaths \$10,000 to his daughter, to be paid out of the estate three years after his wife's death, and after the payment of said sum devises the remainder of the estate to his son, the two subsequent clauses clearly show an intention to limit the estate of the wife to a life estate and to give the fee to the son after the daughter is paid her legacy.

APPEAL from the Circuit Court of Whiteside county;
the Hon. EMERY C. GRAVES, Judge, presiding.

R. W. E. MITCHELL, and HENRY C. WARD, for appellants.

CARL E. SHELDON, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court :

The only question involved in this case is the construction of the second, third and fourth clauses of the will of Meino Meins, deceased. The testator left an estate of 240 acres of land in Whiteside county, of the value of approximately \$30,000, and \$800 in cash.

The first clause of the will provides for the payment of debts. The other clauses are as follows:

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife, Lizzie Meins, all of my property, both real and personal, which I may die possessed of.

"Third—It is my wish, and I hereby direct, that three years after the death of my wife, Lizzie Meins, \$10,000 of my said estate shall be given to my daughter, Annie Oltmans.

"Fourth—After my daughter, Annie Oltmans, has received her share of \$10,000, the remainder of my estate I give, devise and bequeath to my son, Albert Meins.

"Lastly—I nominate and appoint my wife, Lizzie Meins, to be executrix of this my last will and testament."

The chancellor construed the will as vesting an estate in fee in the widow, Lizzie Meins, by the second clause of the will, and decreed accordingly. Albert Meins died, and his widow, Edna L. Meins, personally and as administratrix of his estate, together with her daughters, Mildred A. and Grace E., are appellants herein.

It is the contention of appellants that the second, third and fourth clauses of the will should be construed as one clause creating a life estate in the widow with remainder in fee to Albert Meins, now vested in Mildred A. and Grace E. Meins, his daughters, subject to the dower interest of Edna L. Meins, their mother, and charged with the payment of \$10,000 to Annie Oltmans not later than three years after the death of Lizzie Meins, widow of the testator. On the other hand, the appellees contend that the

widow, Lizzie Meins, took a fee simple estate by the second clause of the will, unlimited by the third and fourth clauses thereof; that by reason of the passing of the fee simple title under the second clause, the third and fourth clauses of the will are mere precatory words and are therefore void.

The rule is that a simple devise of land without any words of inheritance is sufficient, under section 13 of the Conveyances act, to convey an absolute estate in fee unless a contrary intent is shown in other parts of the will. It is the disposition of courts to adopt such a construction as will give an estate of inheritance to the first devisee. Therefore, when the fee is devised by one clause of the will and other portions or clauses of the will are relied upon as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus qualify the estate granted. (*Giles v. Anslow*, 128 Ill. 187; *Jones v. Jones*, 124 id. 254; *Walker v. Pritchard*, 121 id. 221.) Where a testator by his will employed language sufficient to pass the fee simple title to land, in the absence of the expression of a clear intention to cut down the fee to a life estate an estate in fee simple will pass. (*Bowen v. John*, 201 Ill. 292.) If it is clearly shown by other clauses or parts of the will that the testator intended to limit the fee thus granted such intention will prevail, and it is wholly immaterial in what part of the will such intention is manifested. *Rose v. Hale*, 185 Ill. 378; *Giles v. Anslow*, *supra*; *Huffman v. Young*, 170 Ill. 290; *Whitcomb v. Rodman*, 156 id. 116; 2 Jarman on Wills, (5th Am. ed.) 53.

The principal rules of construction are: The intention of the testator, if not inconsistent with the established rules of law or public policy, must govern. This intention must be gathered from the whole will and all its parts taken together. Every clause and provision, if possible, should have effect given to it according to the intention of the maker.

(*Fifer v. Allen*, 228 Ill. 507; *Lander v. Lander*, 217 id. 289; *Hamlin v. United States Express Co.* 107 id. 443; *Henderson v. Blackburn*, 104 id. 227; *Bland v. Bland*, 103 id. 11; *City of Peoria v. Darst*, 101 id. 609; *Giles v. Anslow*, *supra*; *Boyd v. Strahan*, 36 Ill. 355.) A later clause of a will, when repugnant to a former provision, is to be considered as intending to modify or abrogate the former. *Harris v. Ferguy*, 207 Ill. 534; *Hamlin v. United States Express Co. supra*.

In the case of *Hamlin v. United States Express Co. supra*, the devise was to the wife for her own use, with full power to dispose of any of the estate, real or personal, and to convey the real estate by conveyance in fee simple. Elsewhere in the will it was provided that such of the testator's real estate as his wife had not sold during her lifetime should be sold after the death of the wife and divided in the manner therein specified. This court in that case said: "The wife is given everything, with full power to use, enjoy and dispose of the same and convey the real estate by absolute conveyance in fee simple. This, if unqualified, would, of course, vest a fee simple in the real estate, but being qualified, in order to give the language of the qualification any effect this language must be restricted to the life of the wife of the testator. * * * The latter part of the will is to be considered no less than the former part, and to the extent there is repugnance, the language of the former part is to be read as modified by that of the latter part."

In *Boyd v. Strahan, supra*, where the testator left property to his wife with the power of disposition but by later phraseology limited her estate, it was held that, as a general rule, where a will bequeaths personal property to be at the absolute disposition of the legatee, such legatee, in the absence of all clauses showing a contrary intent on the part of the testator, becomes the absolute owner; that the rule which controls in the interpretation of a will is that the intention of the testator to be gathered from the entire

will must govern. It was there said: "There is no other class of written instruments known to the law in which so little importance is to be attached to the technical sense of language in comparison with that sense in which the apparent object of the writer indicates his words to have been used. So far is this principle carried that the court say in 3 Wils. 141: 'Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance it will have little or no weight with the courts, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'" To the same effect is *Lander v. Lander*, *supra*.

This court said in *Fifer v. Allen*, *supra*: "The purpose of courts in construing a will is to ascertain the intention of the testator, so that such intention may be given effect if not prohibited by law. The object to be attained is to give the will the interpretation and meaning which the testator intended, and his intention will be carried out whenever it can be done without violating some established rule of law or public policy. (*Crerar v. Williams*, 145 Ill. 625; *Bradsby v. Wallace*, 202 id. 239; *Perry v. Bowman*, 151 id. 25.) To ascertain the intention of the testator the entire will is to be considered and the different parts compared in view of the circumstances existing when it was made, and the question is, what did the testator intend?—*Young v. Harkleroad*, 166 Ill. 318; *Johnson v. Askey*, 190 id. 58."

It is contended by appellees that the payment of \$10,000 to Annie Oltmans is a condition precedent to the vesting of any estate in Albert Meins, and that as the law favors vesting of estates, this entire estate must be held to be vested in Lizzie Meins, the widow. In support of this contention appellees cite *Jacobs v. Ditz*, 260 Ill. 98. In that case the will specifically provided "that before he shall receive the farm" the son was to pay the testator's daughter a certain sum of money and a certain sum to the testator's step-son

and file receipts therefor with the county clerk. That was held to be a condition precedent to the vesting of the estate. The rule, however, as stated in that case is: "In doubtful cases the courts are inclined to construe an estate as vested in accordance with an accepted public policy, and in such cases will construe a legacy as a charge upon the land devised rather than a condition precedent to the vesting of the estate." In *Hempstead v. Hempstead*, 285 Ill. 448, the rule is laid down that where there is a large charge imposed by the will upon a devisee, or where a devise in a will is made subject to the payment of specific sums to the other beneficiaries, such fact, while not conclusive, is necessarily strong evidence of an intent of the testator to pass by his will a fee to such devisee, as the devise might otherwise not prove a beneficial interest. (Page on Wills, sec. 561; *Johnson v. Johnson*, 98 Ill. 564.) In *Bergan v. Cahill*, 55 Ill. 160, the testator devised a life estate to his wife and the remainder to his son, provided the son pay to the daughter \$100 or an equivalent, and there were no words implying a precedent condition, and it was held that upon the testator's death the son took the fee, subject to the legacy. In *Daly v. Wilkie*, 111 Ill. 382, the devise was subject to the condition that the devisee should, within a term of seven years after the death of the testator, pay to the testator's daughter the sum of \$500. The payment was postponed for seven years after the death of the testator, and it was held that the son took the fee charged with the payment of the legacy. In *Parsons v. Millar*, 189 Ill. 107, the devise was subject to the provision that the son should pay certain sums to the testator's daughters within two or three years after his death. The payments were postponed and held to be charges on the property. To the same effect is the case of *Spangler v. Newman*, 239 Ill. 616. The rule is that the postponement of the time of payment indicates that the payment was not a condition precedent to the vesting of the estate. *Jacobs v. Ditz*, *supra*.

Counsel for appellees cites the case of *Reed v. Welborn*, 253 Ill. 338, in support of his contention that the widow in this case took the fee. An examination of that case discloses that it is to be distinguished from the case at bar. The will devised the property in question to the widow and upon her death to the daughter, with the further provision that if the widow outlived the daughter and the daughter should die leaving no child or children, then at the death of the widow the property was to go to the nearest kin of the testator. The question there was whether or not the fee in remainder vested in the daughter upon the death of her father, the testator. It was there held, under the rule that the court will, if possible, construe a will so as to give an estate of inheritance to the first donee, that the fee vested in the daughter. That case, however, does not contravene the rule, well established in this State, that where other provisions of the will clearly show an intention on the part of the testator to limit a fee the will must be so construed. That rule is applicable here.

Reading the entire will, the second, third and fourth clauses of which all treat of the same subject matter, and applying the rules herein discussed, we are convinced that it was the intention of the testator that the widow, Lizzie Meins, should have a life estate in the property conveyed by the will and that the remainder should vest in fee in the son, Albert Meins, charged with the payment of the sum of \$10,000 to Annie Oltmans. The subsequent provisions of the will, whether they be read as one clause or separately, clearly and unequivocally show the intention of the testator to limit the estate given to the widow by the second clause to a life estate. The third clause directs that \$10,000 shall be given to the daughter, Annie Oltmans, which the testator in the fourth clause designates as her share of the estate. The fourth clause gives, devises and bequeaths the remainder of the testator's estate to his son, Albert Meins. These are not precatory words but positive directions. In

addition it may be said that the second clause of the will contains no words of inheritance, and under the well established rule such a devise passed but a life estate. Albert Meins being now deceased, the remainder in the property in question vests in fee in his daughters, Mildred A. and Grace E. Meins, subject to the dower interest of their mother, Edna L. Meins, and charged with the payment of \$10,000 to Annie Oltmans not more than three years after the death of the testator's widow, Lizzie Meins.

The decree of the circuit court will be reversed and the cause remanded, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

(No. 12418.—Appellate Court reversed; municipal court affirmed.)
LUIGI RUSSO FU AGATINO, Plaintiff in Error, *vs.* L. GINOCCHIO *et al.* Defendants in Error.

Opinion filed June 18, 1919.

1. **CONTRACTS**—*when existence of contract is question of law.* Where there is no dispute concerning the essential facts involved in the making of an alleged agreement the question of the existence of a contract between the parties is one of law which the Supreme Court may review, though the Appellate Court finds, as a fact, that no contract existed.

2. **SAME**—*minds of the parties must meet to make a contract.* A meeting of the minds of parties to a contract as to its terms and conditions is essential to the existence of the contract.

3. **SAME**—*when contract for importation is complete.* Where the only misunderstanding of the parties to a contract for the importation of almonds is as to the time of delivery, the vendees interpreting the term "shipment September" to mean the first half of September, if the vendor, upon being notified of such interpretation by cable, answers "I confirm," the contract is completed, although the vendor afterward wrote his agent a letter, which was not communicated to the vendees, expressing dissatisfaction with the terms of shipment.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON, (EDWARD R. JOHNSTON, of counsel,) for plaintiff in error.

CULVER, ANDREWS, KING & STITT, for defendants in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Plaintiff in error filed his claim in the municipal court of Chicago against defendants in error on three contracts for the sale of almonds. Judgment was secured for the claim in the municipal court in the sum of \$2251.75. On review the Appellate Court affirmed the judgment of the municipal court as to two of said contracts and entered judgment on the same for \$803.55 and reversed the judgment of the municipal court as to the remaining contract, with a finding of facts to the effect that no contract existed between the parties. The cause comes here on *certiorari* to the Appellate Court to review the judgment of that court concerning the third alleged contract. As that contract is the only one in issue in this court, only such portion of the statement of plaintiff's claim and facts relating to said contract need be considered.

The alleged contract was for the purchase and sale of 150 bales of P. & G. almonds at 120 shillings per hundred pounds. Plaintiff in error was represented in Chicago by Harold B. Pinder for the purpose of soliciting orders from Chicago importers. Offers received by Pinder were by him cabled to his principal in Sicily, and in case the terms of sale were agreed upon by the purchaser and his principal, Pinder confirmed the deal by a written memorandum of the terms of sale, one copy of which was sent to the purchaser, one to his principal and one was kept on file in

Pinder's office. In January, 1914, Pinder called on Costa, a member of the firm of Ginocchio, Costa & Co., defendants in error, for the purpose of securing an order for Sicilian almonds to be shipped during the following September or October. Costa asked for quotations on P. & G. almonds to be shipped during the first half of September, 1914. On January 31, 1914, Pinder wired his principal, "Lowest 150 bales Palma new crop, first half of September, direct steamer." On the same day Pinder received a cable from his principal, "126 September," which was immediately reported to Costa, who objected to the price, stating, in substance, that he already had an offer from a seller in Hamburg, Germany, quoting the same at 120. Thereupon Pinder cabled his principal on the 31st as follows: "Hamburg sold 120; business possible same price; telegram." On the second or third of February Pinder received a cable from his principal as follows: "I accept 120 September." Shortly after the receipt of this cable Pinder called at Costa's office and acquainted him with the contents of the cable, upon the receipt of which knowledge Costa stated that he would take 150 bales. Thereupon Pinder sent his principal a cable as follows: "Sold Costa 150 Palma new crop, September, 120, direct steamer." Following this last message Pinder made out in triplicate a written confirmation of the sale, sending a copy to his principal and the original to the defendants in error, who produced said original on the hearing in the trial court, which is as follows:

"Sold to Ginocchio, Costa & Co., Chicago, Ill., for account of Luigi Russo fu Agatino, Catania, Sicily, 150x220 lb. bales sweet shelled P. & G. almonds, Cat brand, 1914 crop, at 120/- per cwt., gross for net C. & F. per direct steamer to New York. Terms: Payment at 90 days against L/ credit on London bank, shipment September."

Some time in the month of March after the delivery of this statement Pinder called upon Costa and suggested that as the market on almonds was becoming bad, defendants in error should re-sell the almonds theretofore sold to them

for September delivery and save loss, whereupon Costa replied that his order was for the first half of September. Pinder called his attention to the order, whereupon Costa stated that if the order went in for September delivery it was wrong, as he had not purchased upon that basis; that his contract was for the first half of September. Thereupon Pinder cabled plaintiff in error that defendants in error understood shipment not later than September 16 instead of September delivery, and asked confirmation. The plaintiff in error confirmed the amendment of these terms by cable, and later wrote Pinder indicating that he (Pinder) would have to stand the loss of such change in the contract as such broker.

It is contended by plaintiff in error that the facts are undisputed in this case, and that whether or not such facts establish a contract described in the amended statement of claim for the sale of the goods in question is a question of law. It is contended by defendants in error that the facts in question are disputed and therefore the parties hereto are concluded by the judgment of the Appellate Court; that the minds of the parties did not meet on the item described in the original claim or in the claim as amended; that the defendants in error had been led to believe that the contract had been withdrawn by the plaintiff in error, and therefore they were justified in refusing to carry out the same.

Upon reading the testimony in the record we find no dispute concerning the essential facts in this case. The question, therefore, whether or not they show the existence of a contract between the parties is a question of law. This court has jurisdiction to review questions of law on writ of error to the Appellate Court even though that court makes a finding of facts, where such facts are not disputed. The question, under such circumstances, is one of correct application of the law to the undisputed facts. *Zeigler v. Illinois Trust and Savings Bank*, 245 Ill. 180; *Brush v. City of Carbondale*, 229 id. 144.

The only question in this case is whether the minds of the parties hereto met in an agreement on the terms and conditions of a contract for the purchase and sale of 150 bales of almonds. This is essential to the existence of any contract. (*Weeks v. Chicago and Northwestern Railway Co.* 198 Ill. 551; *Mozeiko v. Lehigh Valley Transportation Co.* 235 id. 324; *Stanton v. Chicago City Railway Co.* 283 id. 256.) We are of the opinion that the minds of the parties did meet and that a contract was made between them. It appears from the evidence that at the time of the original offer of 150 bales of almonds at "120" the vendor understood the contract to be for "September delivery," which, as explained in the evidence, means in that business a delivery at any time in the month of September, while the vendee claimed that such delivery was to be made during the first half of September. It is evident that at the time the sales memorandum was delivered to defendants in error the minds of the parties had not met on the matter of delivery, which appears to have been one of the conditions of the contract. So the matter stood until the latter part of March of the same year, when the broker, Pinder, called upon defendant in error Costa to suggest to him that the market for almonds having weakened, they ought to re-sell their contract with plaintiff in error and avoid loss. It at this time became known to the broker that Costa understood that the shipment of the almonds was to be made during the first half of the month of September. Pinder, a day or two thereafter, cabled the plaintiff in error advising a modification of the contract to conform to the wishes of Costa, to which plaintiff in error replied by cable, "I confirm." Pinder, upon receipt of this cablegram, went to defendants in error and there showed Costa the cablegram and told him what he had cabled the plaintiff in error and that the cablegram was in reply and agreement thereto, to which Costa replied, "All right," or words to that effect. It is evident that at that time there was a meeting of the minds

of the parties on the only difference between them,—that of delivery,—and that the contract was then and there completed. It appears that nothing further was said about the matter until August 13 following, when plaintiff in error wrote to defendants in error asking for the name of the London firm with which defendants in error would open letters of credit for the 150 bales of almonds. On September 2 defendants in error notified plaintiff in error that “disturbed banking conditions” prevented them opening letters of credit, and eight days later, in a letter inferring the same reason, canceled “the entire business.” There was nothing in either of these communications indicating that the terms had not been agreed upon. The reason assigned was entirely outside the contract. These facts also tend to show that a valid contract existed between the parties.

It is contended that as the plaintiff in error thereafter wrote to Pinder expressing dissatisfaction with the shipment terms of the contract, it showed that he did not agree concerning such shipment and that the minds of the parties did not meet concerning that matter. The clear language of his cablegram in the latter part of March, in reply to that of Pinder advising modification of the contract in that particular and the later assent of Costa thereto, shows that the contract was completed. His letter written later was therefore, at most, but an attempt to break the contract, if it could be even so construed, and since it was not communicated to defendants in error it could not amount to a rescission of the contract. *Roebeling's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 660; *Kadish v. Young*, 108 id. 170.

The judgment of the Appellate Court will be reversed and the judgment of the municipal court affirmed.

Judgment of Appellate Court reversed.

Judgment of municipal court affirmed.

(No. 12578.—Judgment affirmed.)

MARGARET MCFARLANE, Admx., Defendant in Error, *vs.*
THE CHICAGO CITY RAILWAY COMPANY, Plaintiff in
Error.

Opinion filed June 18, 1919.

1. NEGLIGENCE—*what questions are for the jury.* In an action for negligence the questions of the preponderance of the evidence, the credibility of the witnesses and the force of evidence tending to impeach the veracity of the witnesses are for the jury.

2. SAME—*controverted questions of fact are settled by verdict of jury and judgment of Appellate Court.* In an action for damages for wrongful death all controverted questions of fact are settled by the verdict of the jury and the judgment of the Appellate Court, and the only question of fact for the Supreme Court is whether or not there is any evidence in the record fairly tending to support the cause of action.

3. SAME—*personal service of deceased is element of pecuniary loss to next of kin.* In an action for damages for wrongful death the jury must calculate the damages with reference to a reasonable expectation of benefit to the next of kin from the continuance of the life of the deceased, and one of the elements of pecuniary loss to the next of kin is the personal service of the deceased.

4. INSTRUCTIONS—*instructions should be read as a series.* In ascertaining whether the jury have been misled by an alleged faulty instruction other instructions on the subject should be considered.

5. SAME—*when it is not error to give instruction referring to declaration.* If the declaration in an action for negligence is sufficient, it is not error to give an instruction to the effect that if the plaintiff has made out a case as alleged in the declaration the jury should find the defendant guilty, but such practice is not approved.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH B. DAVID, Judge, presiding.

HARRY P. WEBER, GEORGE W. MILLER, and ARTHUR J. DONOVAN, (JOHN R. GUILLIAMS, and FRANKLIN B. HUSSEY, of counsel,) for plaintiff in error.

EDWARD J. GREEN, for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This cause comes to this court by writ of *certiorari* to the Appellate Court to review a judgment of that court affirming a judgment of the superior court of Cook county for \$2500 in an action on the case instituted by Margaret McFarlane, administratrix of the estate of Alice McFarlane, deceased, against the Chicago City Railway Company to recover damages for the death of Alice McFarlane.

There are many assignments of error, but plaintiff in error relies for reversal upon the following grounds: First, the evidence does not fairly and reasonably tend to show that the death of Alice McFarlane was proximately caused by the injuries sustained, and the court erred in refusing to direct a verdict for plaintiff in error; second, the court erred in the giving and refusing of instructions.

The declaration consisted of three counts. The first count alleges, in substance, that the deceased was a passenger on an east-bound electric car of the plaintiff in error operating on Forty-seventh street, in the city of Chicago; that Forty-seventh street intersects a street known as Vincennes avenue; that when said car arrived near Vincennes avenue it stopped for the purpose of allowing deceased and other passengers to alight therefrom; that while deceased was in the act of alighting, and while in the exercise of ordinary care for her own safety, the plaintiff in error, by its servants, so carelessly, negligently and improperly managed and operated said car that the car was jerked, jolted, jarred and moved, and the deceased was by reason thereof thrown to and upon the street and suffered serious injuries, from which she died. The count further alleges heirship and issuance of letters of administration. The allegations of the second count are substantially the same as those of the first count, except the second count alleges that while said car was near to and approaching Vincennes avenue, a place then usually used by plaintiff in error for the purpose

of receiving and discharging passengers, and while said car was then moving slowly at said place and was about to stop, and while the deceased was in the act of alighting from said car in the exercise of due care, all of which plaintiff in error knew or should have known, the servants of plaintiff in error then and there so negligently managed and operated said car that it was suddenly and hurriedly started and jerked, jolted, moved and swayed, and by reason thereof deceased was thrown to the street and received therefrom said injuries. The third count alleges that the car was stopped for the purpose of allowing deceased and other passengers to alight and that she was in the act of doing so and exercising ordinary care, all of which plaintiff in error knew or should have known, when plaintiff in error, by its servants, negligently started the car while deceased was in the act of alighting and before she had a reasonable time in which to alight, by reason whereof she was thrown and received injuries from which she died January 13, 1914.

The first point to be considered is whether or not the court erred in refusing to give the peremptory instruction. This raises the question whether there was any evidence which fairly and reasonably tended to show that the injuries received caused the death of Alice McFarlane. Primarily, it is a question for the trial court whether the evidence, with all the legitimate and natural inferences to be drawn therefrom, is sufficient, if credited, to sustain a verdict. On consideration of such a motion the trial court has nothing to do with any question as to the preponderance of the evidence or the credibility of the witnesses or the force to be given to evidence having a tendency merely to impeach the veracity of the witnesses. The only question which the court has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. (*Libby, McNeill & Libby v. Cook*, 222 Ill. 206; *Woodman v. Illinois Trust and Savings Bank*, 211 id. 578.) The question of the weight to be given the

testimony is a question for the jury. All controverted questions of fact are settled by the judgments of the trial and Appellate Courts, and the only question in this court is whether or not there is any evidence in the record fairly tending to support the cause of action of defendant in error.

The accident occurred about six o'clock in the evening of December 3, 1913. The deceased, a widow aged fifty-seven years, was a passenger on an east-bound car belonging to plaintiff in error. The car on which deceased was a passenger was traveling east on Forty-seventh street, in the city of Chicago, and was following closely another car operated over the same tracks. When the car in question left Grand boulevard deceased requested the conductor to signal the car to stop at Vincennes avenue, the next regular stopping place. Both cars were traveling very slowly. William White testified that he was an employee of the city of Chicago; that he was standing on the rear platform of the car in question and noticed a lady come to the door and call for Vincennes avenue; that the conductor pulled the bell for the stop; that he was counting his transfers and paid no further attention to the lady; that she pulled the door open and stepped out upon the platform; that she stepped down on the step, took hold of her dress with one hand and held to the car with the other hand; that the car stopped and the lady started to step to the ground; that just as she was about to put her foot on the ground the conductor gave the motorman the signal and the car started with a jerk and threw the lady to the pavement; that he and the conductor picked her up and put her in a doctor's car.

Dr. Richard W. Carter testified that on the evening of the accident he was on Forty-seventh street between Vincennes avenue and Grand boulevard and that at the time the accident occurred he was on the sidewalk, facing the street cars; that there were two cars running east along Forty-seventh street, quite near together; that he saw the second car stop between the alley and Vincennes avenue and

saw it stand for an instant and then move forward; that immediately after it started he saw a person lying in the street; that he rushed to assist and found the person lying in the street to be a woman who he learned was Mrs. Alice McFarlane, the deceased; that he found her in considerable distress and quite helpless but conscious; that he placed her in his automobile and drove her to her home, which was near by; that there he made an examination and found a fracture of the patella of the right knee and a fracture of the second phalanx of the second finger of the left hand and considerable injury to the left shoulder and left thorax region; that he placed her leg in a cast, applied splints to the finger and applied a compress and binder to the thorax; that he visited her at frequent intervals until approximately the time of her death, which occurred on January 13, 1914, about forty days after the accident, the number of his visits amounting in all to about twenty-five; that the leg was in a cast for probably five weeks; that she continued to complain of her side; that she suffered from frequent attacks of syncope; that she had difficulty in breathing; that at times she passed into an unconscious state; that there was a decided congestion of the left lung; that he attended the post-mortem, which revealed myocarditis, (an inflammation of the muscles of the heart,) and that the kidneys were congested but not inflamed.

Margaret McFarlane, daughter of the deceased and defendant in error here, testified that prior to receiving the injuries deceased did her own work and that she had never complained of illness; that she kept a seven-room house, in which five people lived,—the mother, an adult son and daughter and two roomers; that the day after the accident deceased had frequent fainting spells and that she gasped for breath, and that these attacks recurred at frequent intervals until her death; that before the accident deceased had never had fainting spells nor had she ever shown any evidence of diseased heart or lungs.

Evidence in behalf of plaintiff in error in part supported the case of defendant in error. It was substantially as follows: Richard B. Thornton, the conductor on the car, did not testify but his testimony given before the coroner's jury was admitted in evidence. It was practically the same as that of White, except he says that while he was counting transfers deceased came to the door immediately after he left Grand boulevard and asked him to let her off at Vincennes avenue; that he signaled the motorman to stop at Vincennes avenue and then continued to count his transfers; that the deceased stepped onto the rear platform and started to step down to the car step; that he put his hand on her shoulder and told her to wait until the car came to a full stop; that she said she would, and that he stepped back to his position and continued to count his transfers; that the car was following another car and was moving very slowly,—sometimes as slowly as three miles an hour; that while the car was thus moving slowly deceased voluntarily stepped to the street and was thrown to the pavement; that he immediately gave three emergency bells as a signal to the motorman to stop; that the car did not stop until after he gave the three emergency bells; that deceased fell about 150 feet west of Vincennes avenue, which was a short distance east of the alley. Timothy Griffin, the motorman, testified that he made no stop from the time he left Grand boulevard until he received the three emergency bells. Leonard C. Monroe and Frank H. Monaghan, two boys riding on the front platform, corroborate him in this. Dr. Joseph Springer, the coroner's physician, testified that he held a post-mortem on the body of deceased. The injuries as described by Dr. Springer are substantially the same as described by Dr. Carter. When asked his opinion as to the cause of death he stated that the deceased came to her death from organic heart disease, complicated by the injuries which the post-mortem revealed.

It is clear that the evidence favorable to the theory of defendant in error, if credited, fairly and reasonably tends to show that the injuries caused the death of Alice McFarlane and that such injuries were the result of the negligence of the servants of plaintiff in error. On this evidence the jury have found that the injuries received in this accident caused her death, and the Appellate Court having approved this finding, this court is precluded from considering the question. The trial court did not err in refusing to direct a verdict in favor of the plaintiff in error.

It is next urged that the trial court erred in giving instruction No. 8, which reads:

"If the jury find a verdict in favor of the plaintiff under the evidence and the instructions of the court, then the jury will be required to assess the plaintiff's damages. In assessing the plaintiff's damages, if any, the jury should allow such damages as will compensate the daughter and two sons of Alice E. McFarlane, deceased, for such pecuniary loss *and personal service she would have rendered them*, if any, as shown by the evidence, as the children of the deceased have sustained by reason of her death, not exceeding, however, the sum of \$10,000."

The italics are ours, and the plaintiff in error insists that the giving of this instruction with these words following "pecuniary loss" was reversible error. It contends that the instruction does not limit recovery to pecuniary loss, but authorizes the jury, in addition thereto, to allow damages as compensation for personal service she would have rendered the next of kin, if any. In every action of this character "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." (Hurd's Stat. chap. 70, sec. 2.) There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the life. These

children might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate. It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with certainty. Clearly, one of the elements of pecuniary loss is the personal service of deceased. (*Goddard v. Enzler*, 222 Ill. 462; *Baltimore and Ohio Southwestern Railway Co. v. Then*, 159 id. 535; *Illinois Central Railroad Co. v. Reardon*, 157 id. 372; *City of Chicago v. Keefe*, 114 id. 222.) Whatever effect these additional words could have had upon the minds of the jurors would not have been with respect to the right of recovery. They tended rather to limit the injuries than to broaden them. We do not believe that the jury were misled by the phrase in the instruction.

If it be conceded that there was a slight inaccuracy in the wording of instruction No. 8, this was cured by the following instructions given at the request of plaintiff in error:

12. "This is an action to recover damages to the next of kin of the deceased. Under the statute the next of kin can only recover, even where the defendant is guilty, such damages as are a fair and just compensation with reference to the pecuniary injuries resulting to the next of kin of said deceased person from such death, and even if you believe from the evidence, under the law as stated in the instructions of the court, that defendant is guilty as charged in the declaration, you can allow to the plaintiff only such damages as will compensate the next of kin for the pecuniary injury, if any are shown by the evidence, resulting from the death of plaintiff's intestate."

25. "With reference to the question of damages, if you reach a conclusion where you will have to consider them at all, the feelings of the children or other relatives, or their wealth or poverty, cannot be considered in assessing damages in a case like this. You cannot allow one dollar for solace or comfort or sorrow of the family. It is only the pecuniary or money loss which the evidence may show

the next of kin have suffered by the death of the deceased. If the evidence shows that they have suffered any pecuniary or money loss by reason of said death, that can be considered in this case."

26. "In this case, even if you find for the plaintiff, you can allow only such damages as will make good the pecuniary loss, if any is shown by the evidence, sustained by the next of kin of the person deceased. Mental suffering or loss of domestic or social happiness or the degree of the culpability of the defendant, if any, are not proper elements in the calculation of damages. You cannot award exemplary or vindictive damages."

These instructions, considered with instruction No. 8, are not contradictory nor inconsistent. They explain the expression used in No. 8 and as a series correctly state the rule of liability. The error, if any, was obviated and rendered harmless. *Richardson v. Nelson*, 221 Ill. 254.

Complaint is also made in regard to the giving of instruction No. 6, which is:

"If you believe from the evidence that the death of Alice E. McFarlane was caused by the negligence of the defendant as alleged in the declaration or some count thereof, and that Alice E. McFarlane herself was in the exercise of ordinary care for her own safety at and before the time of the injury, then you should find the defendant guilty."

It is urged that this instruction was so inartificially drawn that it could very well have been understood by the jury to mean that a recovery was warranted on proof that the death was caused by the acts of defendant alleged in the declaration to have been negligent, together with ordinary care on the part of deceased, and without proof that such acts were, in fact, negligent. We think the instruction is not susceptible of the construction placed upon it by plaintiff in error. Instructions to the effect that if the plaintiff has made out a case as alleged in the declaration then the jury should find the defendant guilty have been approved

by this court in a number of cases, and it is unnecessary to repeat what is said in those cases. (*United States Brewing Co. v. Stoltenberg*, 211 Ill. 531.) A similar instruction was under discussion in *Krieger v. Aurora, Elgin and Chicago Railroad Co.* 242 Ill. 544, and we there reviewed the authorities at length. In that case the averment in the declaration, which by reference was incorporated into the instruction, limited the due care of plaintiff to the time when plaintiff was in danger, regardless of his conduct in putting himself in that position. The instruction herein complained of is not so limited but clearly included the time at and before the injury. It is better and safer practice not to give an instruction of this character, for the reason that the court should define the issues to the jury without referring them to the pleadings to ascertain what they are. Reference is made to the *Krieger case*, *supra*, for our reasons for this holding.

Complaint is also made of the court's action in refusing instructions 1 and 2 offered by plaintiff in error. These instructions did not correctly state the law and were properly refused.

Five instructions were given on behalf of defendant in error and eighteen instructions on behalf of plaintiff in error. "The law applicable to different questions may be stated in separate instructions and the entire law applicable to all the questions involved in a case need not be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient." (*Pardridge v. Cutler*, 168 Ill. 504.) We think the instructions, considered as a series, very fairly presented the law applicable to the case and that there was no error in the giving or refusing of instructions.

Finding no reversible error in the record the judgments of the Appellate Court and the superior court of Cook county are affirmed.

Judgment affirmed.

(No. 12435.—Judgment affirmed.)

THE PEOPLE *ex rel.* Henry Stuckart, County Collector,
Appellant, *vs.* THE INSURANCE EXCHANGE BUILDING,
Appellee.

Opinion filed June 18, 1919.

1. TAXES—*when a levy for county purposes is not sufficiently specific.* In levying general taxes for county purposes, an item of levy for "Juror's fund, for expenses of dieting jurors and fees of jurors and witnesses," is too indefinite. (*People v. Klee*, 282 Ill. 440, followed.)

2. SAME—*when appellee in tax case cannot assign cross-errors.* On appeal by the county collector from a judgment sustaining objections to certain taxes, the appellee is not entitled to assign cross-errors on the action of the court in overruling objections to other taxes against its property.

APPEAL from the County Court of Cook county; the
Hon. S. N. HOOVER, Judge, presiding.

MACLAY HOYNE, State's Attorney, (CHARLES CENTER
CASE, JR., and JOSEPH P. RYAN, of counsel,) for appellant.

LANDON & HOLT, ELLIS & LEWIS, WILLIAM LAWTON,
and ELMER M. LEESMAN, (ROBERT N. HOLT, of counsel,) for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal by the State's attorney on behalf of the People, on the relation of the county collector of Cook county, from a judgment of the county court sustaining objections to certain general taxes levied and extended for county purposes for the year 1917. Cross-errors are assigned on the judgment overruling certain objections and ordering sale of real estate owned by appellee for delinquent taxes.

The questions presented to this court are limited by counsel to objections filed in the trial court to county taxes, only, and are confined to four items of the annual appro-

priation bill of Cook county adopted February 5, 1917, for the then fiscal year. Objections were filed and sustained by the trial court to the appropriation and levy for "Juror's fund, for expenses of dieting jurors and fees of jurors and witnesses, \$408,332." Objections were filed, overruled and judgment and order of sale entered in the matter of the following items in the annual appropriation bill of said county: "Court house building fund, \$100,000;" "Bonds and interest fund, old surplus, \$19,409.13;" "Amount county clerk added for loss and cost to levy for county bonds fund." It is also assigned as error that the trial court permitted the examination of a certain witness by the name of O'Brien from a table not in evidence and thereafter admitting such table in evidence over objections. The foregoing items will be treated in this court in the order above given, with the respective contentions of the parties interested.

Appellant, in support of his contention that the item of levy, "Juror's fund, for expenses of dieting jurors and fees of jurors and witnesses," is a valid levy, strongly urges, that notwithstanding the case of *People v. Klee*, 282 Ill. 440, where this identical item was held invalid as in violation of section 121 of the Revenue act, requiring that the items of levy shall be separate, that under the cases of *People v. Cairo, Vincennes and Chicago Railway Co.* 237 Ill. 312, and *People v. Illinois Central Railroad Co.* 237 id. 324, such levy is valid as a substantial compliance with section 121. Counsel for appellant very earnestly contend that the doctrine of *stare decisis* should be applied to this case, for the reason that the cases of *People v. Cairo, Vincennes and Chicago Railway Co. supra*, and *People v. Illinois Central Railroad Co. supra*, have long been the law in this State and have been cited in numerous recent decisions, whereas the case of *People v. Klee* is but one case in which a different rule is adopted. An examination of these cases and the *Klee* case discloses that the court, in determining

whether or not certain items of levy were sufficiently definite or sufficiently separated, has construed the language used in the levies in former cases. There appears, however, to have been no departure in the *Klee case* from the general rules of law and construction laid down in the earlier cases. The *Klee case* appears to be the only case in which the identical language here used was construed. The construction put upon that language in that case controls here, and the county court did not err in sustaining the objection to said tax.

Appellee has assigned certain cross-errors to the order of the county court overruling its objection to certain items of tax. This court in the case of *People v. Vogt*, 262 Ill. 170, laid down the rule that a judgment as to the different items of tax is, in effect, a distinct judgment as to each item, for reasons analogous to the rule laid down in *Walker v. Pritchard*, 121 Ill. 221, that where one party appeals from only a portion of a decree the other matters not appealed from are not before the reviewing court if such other matters are wholly independent of the part of the decree appealed from, so that one part has no influence or bearing upon a decision as to the other part, that case holding that as to the other part not appealed from the decree constitutes a separate decree. We held in the *Vogt case*, *supra*, that appellee cannot raise on cross-errors the question as to the correctness of the trial court's ruling on items of tax not included in or affected by the judgment concerning the items appealed from, it being there held that he should have appealed from that decision. That case is controlling here. The court cannot, therefore, review the questions raised on cross-errors.

It is also assigned as error that the trial court permitted the examination of a certain witness by the name of O'Brien concerning certain computation tables which were thereafter admitted in evidence over the objection of appellant. We are of the opinion that such testimony could

not in any way affect the holding of the trial court or this court, for the reason that, as we have herein stated, the errors urged are settled by the case of *People v. Klee, supra*.

As the county court did not err in sustaining the objections of appellee upon which appellant has herein assigned error, the judgment of that court will be sustained.

The judgment of the county court is affirmed.

Judgment affirmed.

(No. 12698.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. CHARLEY BROWN *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919.

1. CRIMINAL LAW—*what must be proved to sustain charge of assault to commit murder.* To sustain the charge of assault with intent to commit murder, such facts must be proved that if death had resulted from the assault the assailant would have been guilty of murder.

2. SAME—*malice is an essential element to constitute murder.* Malice aforethought is an essential element to constitute murder, but malice may be implied where no considerable provocation appears or all the facts show an abandoned and malignant heart.

3. SAME—*when shooting at a police officer attempting arrest is not an assault to commit murder.* A charge of assault with intent to commit murder is not sustained by evidence that the defendants shot at a police officer who began pursuing them without a warrant and who fired the first shot in the pursuit, where it is not shown beyond a reasonable doubt that the defendants knew their pursuer was a policeman and there is no proof that they had been guilty of any crime or unlawful conduct.

THOMPSON, J., dissenting.

WRIT OF ERROR to the City Court of Granite City; the
Hon. M. R. SULLIVAN, Judge, presiding.

BURROUGHS & RYDER, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, JOSEPH P. STREUBER, State's Attorney, and JAMES B. SEARCY, for the People.

MR. JUSTICE FARMER delivered the opinion of the court:

Charley Brown, Ed Morrison and Charles Payne were indicted by the grand jury of the city court of Granite City, Madison county, Illinois, for an assault with intent to murder Jeremiah Odem, who was a police officer of Granite City. The assault is alleged to have been committed on June 12, 1917. They were tried and convicted in December, 1918, and sentenced to confinement in the penitentiary at Chester. Since the trial Payne has died, and defendants Morrison and Brown have sued out this writ of error.

The defendants did not testify on the trial. The record discloses that on June 12, 1917, and previously, a considerable number of men were at work in the southwesterly part of Granite City constructing a sewer and a number of teams were used in hauling. Defendants are colored men who were working at driving teams for the contractor having in charge the work. On the 12th of June police officers Odem and Dick, who were members of the police force of Granite City, were notified there was trouble in the vicinity of the sewer ditch being constructed, and they say they understood a man had been shot. They received this notice about 2:15 in the afternoon and went on foot to where a large number of railroad tracks cross Pacific avenue, in the southwesterly part of Granite City. They had about a mile to travel to reach that point. The railroad tracks run north and south across Pacific avenue, which runs east and west. The sewer ditch is in the neighborhood of one-half mile south of Pacific avenue and runs east and west. At the west end of the sewer ditch is a levee along the Mississippi river, running in a general north and south direction. The territory within this square appears to be mostly vacant and

is variously spoken of as "commons," "field" and "dump." When the officers reached the place where the railroad tracks cross Pacific avenue defendants were pointed out to them as the persons who had done the shooting. It does not appear that the officers went together to the place of the alleged trouble or that they were together at the time defendants were pointed out to them as the parties who had been guilty of shooting someone. Officer Dick testified Odem was nearer the men than he was; that they were about 200 or 300 feet from Odem. Odem testified that when he saw them they were walking away from him; that he started to arrest them and hallooed to them to stop. They motioned to him, but he could not tell whether they motioned to him to stop or to come on. They continued to go away from him and he pulled his gun and fired a shot into the air. Defendants returned the shot and ran, the two officers pursuing them. A good many shots were fired by the defendants at Odem, who appears to have been nearest to defendants. Odem testified he emptied his gun and thought the defendants emptied theirs also. One shot hit the ground close enough to Odem to throw dirt on him and another cut a weed within a foot of his knee. Several shots struck the ground in front of him. Defendants ran south to the sewer ditch and crossed over on the south side of it, then turned west to the levee, crossed over the levee, then came back on or east of the levee, and continued south until they were arrested by the police of the village of Madison, at or near Newport. Odem testified that when he saw he would be unable to overtake and arrest defendants he went to a house where there was a telephone, near by, and notified the Madison police to be on the lookout, and they arrested defendants. No complaint or charge had been filed against defendants and no warrant had been issued for their arrest. While the police officers testified they were informed someone had been shot, and when they went to the place where they were told the trouble had oc-

curred defendants were pointed out to them as the guilty parties, they were not then doing any unlawful act, and there was no proof whatever on the trial that they had shot anyone or fired a gun or had been guilty of any criminal or unlawful conduct of any kind or nature. When the officers went to the neighborhood where they were informed trouble had occurred and where defendants were pointed out to them, defendants were from 100 to 200 yards from them, walking away from the place where the officers were. Odem called to them to stop and started toward them to arrest them. They did not stop but continued going away from the officers. He fired a shot in the air, whereupon defendants began shooting and running. Odem pursued them, firing at them until he emptied his gun, and as defendants ran they would turn and fire at Odem. It seems there were several men at or near the place when the chase began, and when Odem started toward defendants to arrest them and called to them to stop, some of the crowd started with the officers, and after the shooting began the crowd following defendants grew larger.

It is contended the evidence did not warrant the verdict of guilty of assault to commit murder. To sustain the charge of assault to commit murder, such facts must be proven that if death had resulted from the assault it would have been murder. It is insisted that no proof was made on the trial that any criminal offense had been committed; that the officer had no warrant for the arrest of defendants, and that if they had killed the officer the crime could not have been anything more than manslaughter. Malice aforethought, express or implied, is an essential element to constitute murder. It is implied where no considerable provocation appears or all the circumstances show an abandoned and malignant heart. It was not shown by testimony on the trial that there was any reason or cause for the arrest of defendants by Odem, which act he was attempting to do without a warrant. In *Rafferty v. People*, 69 Ill. 111,

and the same case in 72 Ill. 37, this court held that if a public officer is killed by a person whom he is attempting to illegally arrest without authority of law, the killing will be manslaughter, only, unless the evidence shows previous or express malice.

It is claimed by the People that peace officers may at common law arrest persons in their county without a warrant on reasonable suspicion of their having committed a felony, and it is argued that as Odem had on his policeman's uniform defendants knew his official character. No proof was made on the trial of any acts or conduct of defendants which justified suspecting them of having committed a felony. The arrest attempted in the *Rafferty* case was by a policeman in uniform. In this case it is not very clear that defendants saw and recognized that Odem had on a policeman's uniform. In *People v. Bissett*, 246 Ill. 516, the court said before the State could take advantage of the official character of an officer (who was in plain clothes in that case) for the purpose of characterizing as murder the act of killing him by a man he was attempting illegally to arrest, it was essential that it be shown, beyond reasonable doubt, that the slayer had knowledge of his official character and of his authority,—citing the *Rafferty* case and *Starr v. United States*, 153 U. S. 614.

We do not think the evidence in this record sufficient to sustain a conviction for the crime of assault to commit murder. No instruction was given that the jury might, if the evidence warranted it, find the defendants guilty of a lesser crime under the indictment. *Beckwith v. People*, 26 Ill. 500.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE THOMPSON, dissenting.

(Nos. 12692-12693.—Judgments affirmed.)

GILES S. FARMER, Trustee, *et al.* Appellees, *vs.* MARY E. FOWLER *et al.* Appellants.

Opinion filed June 18, 1919.

1. PRACTICE—*counsel must base argument in Supreme Court on matters found in record.* The Supreme Court is bound to try a case on the record and not on statements made outside of the record by counsel for either side, and it is improper for counsel to attempt to base their argument in any case upon matters not found in the record.

2. SAME—*general rule where party files pleading after time has expired.* Where the time for pleading has expired and a party has filed a pleading without leave of court and without the consent of the adverse party the filing thereof is an irregularity, which, if not waived, renders the pleading liable, at the discretion of the court, to be stricken on motion or to be treated as a nullity. (*Walter Cabinet Co. v. Russell*, 250 Ill. 416, followed.)

3. SAME—*general rule as to time for filing pleadings.* The time when pleadings must be filed is usually regulated in each jurisdiction by statute or a rule of court and may be extended by the court in its discretion, on good cause shown, but if the time is not fixed by statute or rule the pleading must be filed within a reasonable time, and what is a reasonable time is a question addressed to the discretion of the court.

4. SAME—*rules of practice should not impede administration of justice.* Rules of pleading and practice should facilitate getting at the real facts in a legal proceeding in an orderly manner, and should promote, and not impede, the administration of justice.

5. SAME—*parties asking for extension of time to plead should show good reason therefor.* Persons who ask for an extension of the time set for the filing of pleadings should show some good reason for such request, and the court, in its discretion, may require in support of such motion for extension, an affidavit setting out the reasons.

6. SAME—*discretion of court in setting aside default judgment or giving time to plead is not reviewable except for abuse.* The setting aside of a default judgment or giving time to plead is within the discretion of the trial court and is not reviewable on appeal except for abuse of discretion.

7. SAME—*when it is not material whether trial court violated its rules in not requiring notice before striking answer.* The purpose of a rule of court requiring the giving of notice of the making of a motion is to give both parties a hearing before the court

enters an order; and it is immaterial, on appeal, whether the trial court violated such rule in not requiring notice before striking an answer from the files, where a hearing on the merits of the question was had on a motion to set aside the order and for leave to re-file the answer.

8. SOLICITORS' FEES—*who is competent to testify as to amount of fees.* In a foreclosure proceeding a witness who had formerly been master in chancery in the county in which the suit is brought is competent to testify, from an examination of the files of the foreclosure suit and the knowledge acquired from his office, as to the usual and customary amount charged for such work as was done by the complainants' solicitors.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lake county; the Hons. C. C. EDWARDS, and R. K. WELSH, Judges, presiding.

S. H. BLOCK, for appellants.

COOKE, POPE & POPE, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed in the circuit court of Lake county to foreclose a trust deed given by appellants to Giles S. Farmer, trustee, to secure a note for \$3500. Another bill was filed in the same court to foreclose another trust deed for \$3700, secured on other real estate in said county, the parties to both proceedings being the same. After the pleadings were settled in both these cases they were referred to a master in chancery to take proof, and the master reported recommending the foreclosure of both trust deeds. From each of these decrees an appeal was taken to the Appellate Court for the Second District and both decrees were affirmed. The Appellate Court granted a certificate of importance, and both cases have been brought to this court on appeal.

The same material facts and legal questions being involved in both cases, the two causes have been consolidated here on motion and heard as one cause. For convenience

we shall consider the consolidated cases as if they were only one foreclosure proceeding.

Appellee the Security Savings Bank was the owner of the notes, and its president, Giles S. Farmer, was named as trustee in the trust deeds. The bills were filed at the March term of the Lake county circuit court. Appellants appeared by counsel on the first day of the term and obtained leave to plead within ten days. The day after said ten days had elapsed appellants filed answers denying that they made the notes and trust deeds. This denial was in short form, with no attempt to explain the situation. Two days thereafter, March 16, the appellees' solicitor appeared before the court without any previous notice to appellants or their solicitor and without the presence of either in court and moved the court to strike the answers from the files on the ground that they were not filed within the ten days. The motion was allowed and the answers stricken from the files, and an order was thereupon entered defaulting appellants and referring the cause to a master in chancery. On March 19, 1918, appellants by their solicitor appeared before the court, having theretofore served notice upon opposing counsel, and moved to set aside and vacate the order of March 16, which struck the answers from the files and ordered default and reference. This motion, after hearing and argument, was denied and the cause then proceeded to be heard before the master in chancery, testimony being taken and a report being thereafter made by the master recommending a decree of foreclosure and the allowance of solicitors' fees for appellees. Objections were filed to the master's report, which were overruled, and appellants thereafter appeared before the chancellor in the circuit court and filed exceptions, which were also overruled and decree entered in accordance with the master's report, including the amount due as solicitors' fees to be taxed as costs.

Appellants made no attempt to show the trial court any reason why the answer was not filed in time or that they

had a meritorious defense, but contended there, as they do here, that having filed their answer before the default was taken it was legally filed, though a day after the time granted in which to file it. The controlling question, it is conceded by both parties, is, therefore, whether under proper practice an answer can, as a matter of right and of course, be filed after the expiration of the time given in which to file said answer.

We find in the briefs considerable discussion as to whether or not any statements were made on the hearing of the motion to set aside the order in the circuit court as to why the answer had not been filed in time, and whether the trial court, in ruling that it would not set aside the order striking the answer, stated that it would not allow it to be re-filed without the filing of an affidavit by appellants showing that the defense in said answer was made in good faith. Counsel for appellees contend that such statements were made by the trial judge, while counsel for appellants insists that no such statements were made. Counsel for appellants is correct in saying that the record shows nothing as to any statements being made by counsel or the court as to the merits of the defense on the hearing as to setting aside the order striking the answer. It needs no citation of authority to show that this court is bound to try this case on the record and not on statements made outside of the record by counsel for either side. It is improper for counsel to attempt to base their argument in any case upon matters not found in the record, and we shall not consider any such statements in the consideration of this cause.

The general rule seems to be that where the time for pleading has expired and the party has filed a pleading without leave of court and without the consent of the adverse party the filing thereof is an irregularity, which, if not waived, renders the pleading liable, at the discretion of the court, to be struck out on motion or to be disregarded or treated as a nullity. (21 Ency. of Pl. & Pr. 708, and

authorities there cited.) The time when pleadings must be filed is a matter which is usually regulated in each jurisdiction by statute or rule of court. If the time is not fixed by statute or rule the pleading must be filed within a reasonable time, and what is reasonable is a question addressed to the discretion of the court. Such a statute or rule is clearly directory, and the time limited may be extended by the court within its discretion, good cause being shown, but unless done with the court's consent a pleading is filed too late if filed after the expiration of the time prescribed by statute or rule and it may be stricken out or set aside. (31 Cyc. 597, and cited cases.) In *Dunn v. Keegin*, 3 Scam. 292, this court said, in substance, that the general and correct practice is to consider that a pleading was filed in time if filed before the motion for default was entered, rather than to consider that it must be filed within the time limited by the order. For expressions somewhat similar in effect, see *Castle v. Judson*, 17 Ill. 381, and *Coak v. Forest*, 18 id. 581. In *Robb v. Bostwick*, 4 Scam. 115, the court said (p. 116): "The plea of the defendant interposed no obstacle to the exercise of this authority. It was filed by the defendant without having previously obtained leave of the court for that purpose and should have been stricken from the files of the court, after which there could have been no objection to rendering a judgment at that term." In *Flanders v. Whittaker*, 13 Ill. 707, the court held that the defendant had no right to plead, after the expiration of the rule, without special leave of court, and that a plea so filed might be disregarded. The seeming conflict between *Robb v. Bostwick*, *supra*, *Castle v. Judson*, *supra*, *Flanders v. Whittaker*, *supra*, and *Cook v. Forest*, *supra*, does not appear to have been referred to in any way by the later decisions. In the quite recent case of *Walter Cabinet Co. v. Russell*, 250 Ill. 416, the court said (p. 419): "After the expiration of the rule the defendant had no right to plead without special leave of the court, and neither the

court nor the plaintiff was required to recognize in any way the statement of claim thus placed among the papers in the cause without authority of law,"—citing in support of this conclusion *Robb v. Bostwick*, *supra*, *Flanders v. Whittaker*, *supra*, and *Davis v. Lang*, 153 Ill. 175. Here, again, the court in no way referred to the former decision of *Castle v. Judson*, *supra*, or *Cook v. Forest*, *supra*. Section 44 of the present Practice act provides that "on the appearance of the defendant or defendants, the court may allow such time to plead as may be deemed reasonable and necessary." Section 27 of the Practice act of 1872 contains a similar provision, as did section 14 of the Practice act of 1845, (Laws of 1845, p. 415,) as also section 11 of the Practice act of 1833, (Laws of 1833, p. 489,) and section 11 of the Practice act of 1827. (Laws of 1827, p. 313.)

It is most earnestly argued that the decision in the case of *Walter Cabinet Co. v. Russell*, *supra*, cannot be held as necessarily overruling the holdings of this court in *Castle v. Judson*, *supra*, and *Cook v. Forest*, *supra*, as the last decision was rendered in construing the special provisions of the Municipal Court act of the city of Chicago, and the practice under that act differs in many respects from ordinary practice in the common law courts of the State, and that therefore it was not necessary to refer in any way to the rule laid down in *Castle v. Judson*, *supra*, or *Cook v. Forest*, *supra*. The same argument might be made with like force with reference to the seeming contradiction between the earlier decisions of this court in *Dunn v. Keegin*, *supra*, *Robb v. Bostwick*, *supra*, *Flanders v. Whittaker*, *supra*, *Castle v. Judson*, *supra*, and *Cook v. Forest*, *supra*, as some of these earlier decisions were plainly rendered with reference to orders entered in vacation under the special statutes then in force. The time when a reply must be filed is, as has been said, usually fixed by statute or rule of court, but these statutes and rules should be given a liberal construction in the interest of justice, and such a practice should

doubtless be encouraged by the court so far as is consistent with the prompt and efficient dispatch of the business of the courts. (*Dunn v. Keegin, supra.*) Rules of pleading and practice should facilitate getting at the real facts in a legal proceeding in an orderly manner and should promote and not impede the administration of justice. In our judgment the correct rule was laid down by this court in *Walter Cabinet Co. v. Russell, supra*, both as to our general Practice act and the Municipal Court Practice act, that after the expiration of the rule to plead the defendant has no right to plead without leave of court, and while the court could during the term, on good cause shown, rule liberally in favor of allowing pleadings to be filed in order to hear and decide the case on the merits, the persons who ask for such extension of time are asking it as a favor and should ordinarily be expected to show some good reason for such request. Courts very generally exercise their discretion in such matters by requiring, in support of such motion, an affidavit setting out such reasons. (31 Cyc. 374; see, also, *City of Carlyle v. Carlyle Water, Light and Power Co.* 140 Ill. 445; *Anderson Transfer Co. v. Fuller*, 174 id. 221.) The setting aside of a default judgment, or giving time to plead, is within the sound discretion of the court and not reviewable on appeal except for abuse of discretion. *Culver v. Hide and Leather Bank*, 78 Ill. 625; *Anderson Transfer Co. v. Fuller, supra*; 21 Ency. of Pl. & Pr. 708, and authorities cited in notes.

In our judgment the answer of appellants was rightly stricken as being filed after the rule had expired, and in moving to set aside such order appellants were asking a favor and not demanding a right, and therefore they were only entitled to its allowance in the sound discretion of the trial court. As they made no showing why they were late in filing such answer or that they were acting in good faith in asking to have the order set aside striking the answer from the files, there is nothing in this record to show that

it would promote the ends of justice for this court to interfere with the discretion of the trial court in refusing to set aside such order. Surely, if appellants were acting in good faith it would have been a very simple matter to make a showing to that effect. Not having done so, we cannot say that the trial court abused its discretion in refusing to set aside said order.

Counsel argues at considerable length that the trial court disregarded one of its rules as to notices of motions when the answer was stricken from the files. The purpose of such a rule is to give both parties a hearing before the court enters an order. They had such a hearing upon the merits of the question, so far as presented in the record, on their motion and request to set aside the order and for leave to re-file their answer. We agree with the conclusion of the Appellate Court on this point, that whether the trial court violated its own rules in not requiring notice before striking the answer from the files is therefore immaterial.

Counsel for appellants also argues that the trial court erred in allowing solicitors' fees of \$350 and \$400, respectively, in these cases. The objections and exceptions relied upon before the master and court were limited to the fact that the witness who testified as to the solicitors' fees had no information as to the work actually done by complainants' solicitors except what he could judge from an examination of the files. There can be no question as to the competency of the witness. He had been a master in chancery of that court, and we assume was competent to judge, from the knowledge so obtained, what would be the usual and customary fee in that county for the work so indicated. We see no reason why the decree of the court should be reversed on this ground.

The judgment of the Appellate Court will be affirmed in each of these cases.

Judgments affirmed.

(No. 12181.—Reversed and remanded.)

THE STATE PUBLIC UTILITIES COMMISSION *ex rel.* The Board of Trade of Chicago, Appellee, *vs.* THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *et al.* Appellants.

Opinion filed June 18, 1919.

1. PUBLIC UTILITIES—*what must be shown before commission can establish a through route and joint rate.* Before the Public Utilities Commission is authorized to establish a through route and a joint rate for the shipment of freight, the proof should show, and the commission should find, that the public convenience and necessity demand such route and rate, either because the rate charged is unjust, unreasonable or excessive or because there is no satisfactory through route or joint rate in existence.

2. SAME—*when finding that rate is too high does not authorize establishing a through route and joint rate.* The convenience and necessity of the public are the controlling considerations in a hearing before the Public Utilities Commission, and the mere finding of the commission that freight rates are too high does not authorize it to establish a through route and joint rate, where it is not shown and found that public consideration demands such order. (*Public Utilities Com. v. Toledo, St. Louis and Western Railroad Co.* 286 Ill. 582, followed.)

CARTER, J., dissenting.

APPEAL from the Circuit Court of Sangamon county;
the Hon. E. S. SMITH, Judge, presiding.

GEORGE B. GILLESPIE, (L. J. HACKNEY, F. L. LITTLETON, and C. P. STEWART, of counsel,) for appellants.

JEFFERY, CAMPBELL & CLARK, (JAMES CLARKE JEFFERY, of counsel,) for appellee.

EDWARD J. BRUNDAGE, Attorney General, GEORGE T. BUCKINGHAM, WILLIAM E. TRAUTMANN, ALBERT D. RODENBERG, and MATTHEW MILLS, for the Public Utilities Commission.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from the circuit court of Sangamon county, prosecuted to review the judgment of that court confirming an order of the Public Utilities Commission.

On June 22, 1915, the board of trade of the city of Chicago filed a complaint with the Public Utilities Commission in which it charged that the rates of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (hereinafter called the Big Four) for the transportation of grain in car-load lots to Chicago from stations located on its several lines in Illinois were unjust, unreasonable and excessive, and that, excepting from a limited number of stations on its Chicago division, said railroad company had no intra-state through routes between said points and Chicago and had no joint rates on grain and grain products from said Illinois points to Chicago. At the hearing before the commission this case was consolidated, by stipulation, with the case of Hurst Bros. & McNutt, Newlin Bros., against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, which complaint raised substantially the same issues. The commission heard evidence and entered an order that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, in connection with the Atchison, Topeka and Santa Fe Railroad Company, the Chicago and Alton Railroad Company, the Chicago and Eastern Illinois Railroad Company, the Chicago, Burlington and Quincy Railroad Company, the Chicago, Rock Island and Pacific Railway Company, the Illinois Central Railroad Company and the Wabash Railroad Company, establish and put into effect joint rates for all grain moving in car-load lots from certain points mentioned on the several divisions of the Big Four to the city of Chicago. As the basis of the order on which these rates were established the commission found "that the rates complained of are unjust and unreasonably high."

The Big Four has one division wholly and three others partly in the State of Illinois. Its Chicago division, including a branch known as the Kankakee and Seneca railroad and a contract arrangement by which it reaches Chicago over the Illinois Central railroad from Kankakee, extends from Seneca and Chicago through Kankakee and Sheldon, Illinois, to Indianapolis, Cincinnati and Louisville. Its Peoria and Eastern division stretches from Peoria, Illinois, across the State through Danville, Illinois, and then east to Indiana and Ohio points. Its St. Louis division runs from East St. Louis through Vermilion, Illinois, to Indiana, Ohio and Michigan points. Its Cairo division extends from Cairo, Illinois, to Danville, Illinois. Most of the time prior to 1909 the Big Four maintained intrastate through routes and joint rates on car-load shipments of grain to Chicago from stations on its Illinois lines. The joint rate for each 100 pounds to Chicago from stations on the Chicago division, Greenwich to Seneca, was five cents, on the Peoria and Eastern division, Beckwith to Peoria, seven cents, and on the St. Louis division, Vermilion to East St. Louis, eight cents. From time to time these intrastate through routes and joint rates were discontinued by the Big Four, so that none remained after 1909. At the time this complaint was filed the Big Four had in effect a rate of seven cents on grain in car-load lots to Chicago from stations on the Kankakee and Seneca railroad,—a part of its Chicago division. There were no other intrastate through routes between points on the Big Four and Chicago. From points on the Peoria and Eastern division there was a joint rate of ten cents, from points on the St. Louis division there was a joint rate of eleven cents, and from points on the Cairo division there was a joint rate of from ten to fourteen cents, all *via* Danville and the New York Central railroad to Chicago,—an interstate route. The intrastate joint rates proposed by the complainant and which were ordered by the commission are five cents from stations Greenwich

to Seneca, on the Chicago division, and seven cents from stations Beckwith to Leslie, on the Peoria and Eastern division, and seven cents from stations Vermilion to Mattoon, and eight cents from stations Gays to East Alton, on the St. Louis division, and rates ranging from seven cents to eleven and eight-tenths cents from different stations on the Cairo division to Chicago. The intrastate through routes established by the order of the commission are all two-road hauls.

It is contended by the appellants that the commission was without jurisdiction to make the order establishing through routes and joint rates, because there is no evidence in the record showing that the public convenience and necessity demand the establishing of such through routes and joint rates, and more especially because there is no finding by the commission in its order that public convenience and necessity demand the establishing of through routes and joint rates. Appellee insists that the finding of the commission in its order that the rates complained of are unjust and unreasonably high is sufficient to support the jurisdiction of the commission in entering said order, and that it is unnecessary to show that the public convenience and necessity require the establishment of said through routes and joint rates.

In *State Public Utilities Com. v. Toledo, St. Louis and Western Railroad Co.* 286 Ill. 582, we reviewed the authorities extensively, and there held that the proof should show, and that the commission should find, that the public convenience and necessity demanded, before the commission is authorized to establish, a through route and joint rate, either because the rate charged is unjust, unreasonable or excessive, or because there is no satisfactory through route or joint rate in existence. The convenience and necessity of the public are the controlling considerations in a hearing of this character, and the public to be considered is the producer of the grain and the consumer of it. A careful read-

ing of the case just cited, where the reasons for our conclusion are set forth, will show clearly that this order can not stand.

In this record there is no evidence to support the jurisdictional fact that public convenience and necessity demand the establishment of through routes and joint rates and there is no finding by the commission in its order that the public convenience and necessity demanded a through route and joint rate, and therefore the circuit court erred in confirming the order of the commission.

The judgment of the circuit court is reversed and the cause is remanded, with directions to set aside the order without prejudice to the power of the commission to entertain a new proceeding, either on complaint or on its own motion.

Reversed and remanded, with directions.

Mr. JUSTICE CARTER, dissenting.

(No. 12592.—Reversed and remanded.)

FRANK F. FOLLETT, Admr., Defendant in Error, vs. THE ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error.

Opinion filed June 18, 1919.

1. NEGLIGENCE—*owners must take precautions to protect children playing with attractive device on premises.* Where an owner creates upon his premises a device which from its nature has a tendency to attract children and is either dangerous in itself or is in a dangerous locality, the law requires such reasonable precautions as the circumstances admit of to prevent children from playing with the thing or to protect them from injury while playing with it.

2. SAME—*plaintiff must prove ordinary care by parents with respect to child going to dangerous locality.* An administrator suing to recover for the death of a child who was run over while playing near a railroad must prove that the parents, whose home was near the railroad, exercised ordinary care with respect to the child

going near the tracks, and an instruction stating such proposition should not be so modified as to put the burden on the defendant to prove that the parents did not exercise such care.

3. SAME—*what must be shown to render a negligent act the proximate cause of injury.* To make a negligent act the proximate cause it is not necessary that the particular injury could reasonably have been foreseen, and where the consequences follow in unbroken sequence from the wrongful act to the injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his act or neglect.

FARMER, J., dissenting.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

WOODWARD & HIBBS, (JOHN G. DRENNAN, of counsel,) for plaintiff in error.

R. C. DONOGHUE, BUTTERS & CLARK, and H. H. BAYNE, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, the Illinois Central Railroad Company, maintained on the west side of its single main track, running northerly and southerly, a depot in the north part of the city of Oglesby until December, 1912, when it abandoned that depot for a new one half a mile or more south, near Walnut street, and the old depot was kept locked and used only by the section men for their tools. The depot was on the west side of the track and was 48 feet long, and between it and the track there was what is called a platform about 150 feet long and 14 feet wide, made of cinders covered with crushed stone, and there was a wooden curb-

ing around it. The platform was eight or ten inches higher than the rail, and south of it there was a passing track on the east side of the main line, leaving that line at a switch-point about 250 feet south of the depot. The railroad company kept an ordinary push-car, with a platform about eight feet long and about five or six feet wide, at the depot, and it was sometimes locked or fastened and sometimes not. On the evening of June 23, 1913, the push-car was not locked or fastened and could be pushed about. Shortly after seven o'clock on that evening a freight train headed north, consisting of twenty-eight cars loaded with cement and eight empty coal cars at the rear, without a caboose, stood on the passing track waiting for a passenger train to go south. The passenger train went by and the switch was then lined for the main track so that the freight train could go north. When the last car went out of the switch the rear brakeman lined the switch for the main line, gave the go-ahead signal and climbed on the rear coal car. The train was moving three or four miles an hour and it then increased its speed to about seven or eight miles an hour in passing the depot. Cassie Kosinski, a girl seven years and nine months of age, lived with her parents about 700 feet from the depot. The family had supper about 6:30 and afterward Cassie went to the depot platform, and as the train passed she was run over and fatally injured, so that she died the next day. Her administrator brought suit for damages in the circuit court of LaSalle county, and the cause was tried upon the original declaration of one count and three additional counts, charging defendant with liability on the grounds that the push-car was attractive and enticing to children; that trains frequently passed the platform and Cassie was induced to go to the place to play by the fact of the push-car standing there unlocked; that children, while playing with the push-car, would be liable to be struck by passing trains or slip or fall down the abrupt edge of the platform or be drawn under the wheels of a passing train

by air suction; that the defendant knew, or had a reasonable opportunity to know, that children had been in the habit of going to the platform to play and pushing the push-car about on the platform, and that Cassie, while playing with the push-car, was unavoidably struck by the freight train, run over and injured so that she died. The plea was not guilty.

The controverted questions of fact were whether the defendant was guilty of negligence in leaving the push-car unlocked; whether the parents of the child exercised ordinary care with respect to her going to the depot; whether she was at the time playing with the push-car and pushing it about, and if so, whether it was the proximate cause of her injury and death. There was a verdict followed by a judgment for \$3500, and on appeal to the Appellate Court for the Second District the judgment was affirmed. The record has been brought from the Appellate Court by writ of error, in pursuance to a *certiorari* allowed by this court.

There was no witness testifying who saw the accident. A witness who lived east of the depot testified that he went to the depot and crossed the track to the platform; that as he went over the platform he saw Cassie Kosinski pushing the push-car north near the south end of the depot, a foot or a foot and a half west of the track; that there were other children there but not close to her, and she was the only one pushing the car; that he passed the engine of the freight train south of the platform and the train was not going fast; that he walked a little distance and heard somebody scream and turned around and saw a brakeman pick up the child about five or six feet north of the place where he saw her pushing the car, and that the car then stood near the edge of the platform, about the same distance as when he passed it before. He was a Lithuanian and testified at the trial through an interpreter, and he had been examined in English by an agent of the defendant concerning what he knew. His answers to questions at that time were taken

down by a stenographer, who testified that he spoke English and the witness understood what he said. There were differences in the statement then made from his testimony at the trial, the chief material difference being that there were lots of kids pushing the car, and there were somewhat different statements at the trial as to the place where the child was picked up, but, of course, some difficulty in speaking English when the statement was given must be taken into account. On the part of the defendant the rear brakeman, who had set the switch and climbed on the last car, testified that he gave a stop signal when he heard someone scream and ran and picked up the child and afterward gave her to her mother; that he saw the push-car at that time and it was about a foot from the depot and 12 or 15 feet from the railroad track, and that when he picked up the child he saw a woman and baby right north of the depot but she disappeared all of a sudden and he did not see her go. The engine foreman in charge of the train, who was forward brakeman, testified that after the passenger train went through he lined up the switch for the main track to let the freight train out of the passing track, and after a few cars had passed he got on top somewhere between the engine and the eighth or tenth car and stood up on a box-car; that the train was going three or four miles an hour and in passing the depot he saw some children and a woman with a baby in her arms; that there were three girls there, running around playing at the south end of the depot; that he did not see any push-car and did not see anybody pushing the car; that he started for the Kosinsky home to call the parents; that when he came back the push-car was standing north of the depot, four or five feet from it and probably 24 feet from the railroad track. Two employees of the Marquette Cement Company testified that they used to get on the cars in going back from their work when the "Q" work train was late, and that they climbed on top of a car about the middle of this freight train while it was

standing on the passing track and sat down, facing west. One of them testified that when they passed the depot he saw a woman with a child in her arms sitting on the push-car, a few feet from the north end of the depot, and saw a little girl running along the side of the box-car, with her hand extended towards the train. The other one testified that as they passed the platform he did not see any push-car or see anyone pushing the car back and forth; that there were three or four children standing near the depot; that he did not see a woman there holding a baby, and that he did not see the platform near the cars and could not have seen the push-car if it was down close to the train. A witness for the plaintiff said that the platform was a foot or eighteen inches from the west rail of the track, and the station agent testified that it was about three and one-half feet. Whether the push-car was near the edge of the platform or not, it was undisturbed and not struck by the train. A witness for plaintiff testified that she saw Cassie at the depot about seven o'clock, and also saw a woman there at that time sitting on the push-car, facing the railroad tracks.

At the close of the evidence the defendant moved the court to direct a verdict of not guilty, and the motion was denied. This recital of the evidence as to the controverted facts sufficiently shows that the court did not err in denying the motion. The court did not err in submitting the issue to the jury, and whether the verdict was contrary to the greater weight of the evidence was for the trial court and the Appellate Court.

The law fixes a different standard of liability in case of injury to children going upon premises where there is a dangerous agency than that which applies to adult persons. Where an owner creates upon his premises a dangerous thing which from its nature has a tendency to attract children, who from childish instincts are drawn into danger, the law requires such reasonable precautions as the circumstances admit of to prevent them from playing with the

thing or to protect them from injury while playing with it. The cases fall into two classes: First, where the injury results from some dangerous element a part of or inseparably connected with the alluring thing or device, as in the turn-table cases, where children may be killed or injured while playing with the thing on account of its dangerous nature; second, where the attractive device or thing is so located or situated that in yielding to its allurements the child, without such intervention of another element as breaks the relation of cause and effect, is brought directly in contact with danger from some independent source which occasions the injury. (*Seymour v. Union Stock Yards Co.* 224 Ill. 579.) The push-car was entirely harmless in itself and had no dangerous element which was a part of or inseparably connected with it, and therefore it did not come within the first class. Any charge of negligence against the defendant would rest on the fact that the childish instincts of children would naturally attract them to play with the push-car, which might bring them into contact with means of danger to which the defendant exposed them by not locking or fastening the push-car.

The push-car was kept at the depot for the use of the section men in handling railroad ties, and the defendant asked the court to give the jury this instruction:

"The court instructs the jury that the defendant company had the legal right to place and maintain the push-car in question on its own premises."

The court modified it to make it read that the defendant company had the legal right "ordinarily" to place and maintain the push-car in question on its own premises. Perhaps it would not have been error to refuse the instruction, because no question as to the right to keep the push-car at the depot for the handling of ties had been raised before the jury and the only question related to its being unlocked or unfastened, but to say that the defendant had ordinarily the right would naturally raise an inference that under some

circumstances it had no such right. As instructions are to be applied by the jury to the case, the jury, in making the application, might except the keeping of the push-car there from the right which the defendant ordinarily had. The instruction should not have been given as amended by the court.

There was evidence relating to the degree of care exercised by the parents of the child with regard to her going from her home to the depot and the circumstances of the family, and the defendant asked the court to instruct the jury that it was the duty of the parents to exercise the same degree of care concerning the child as an ordinarily prudent person would exercise under like circumstances, and to find the defendant not guilty unless they believed, from a preponderance of the evidence, that at the time of the injury the child's parents, and each of them, did exercise that degree of care. The court modified the instruction so as to read as follows:

"The court instructs the jury that it was the duty of the parents, and each of them, of said Cassie Kosinski to exercise the same degree of care concerning the said child as an ordinarily prudent person would exercise under like circumstances, and if you believe, from the preponderance of the evidence, that at the time of the injury to said Cassie Kosinski that such parents, and each of them, did not exercise the same degree of care concerning their child as an ordinarily prudent person would exercise under like circumstances, and that such want of ordinary care on the part of the parents contributed in any degree to the injury and death, then you must find the defendant not guilty."

The defendant had a right to have the law given to the jury that the burden was on the plaintiff to prove the exercise of ordinary care on the part of the parents, who were to participate in any recovery, and the instruction was changed by the court so as to place that burden upon the defendant, and require it to prove, by a preponderance of

the evidence, that the parents did not exercise the required degree of care.

The defendant asked, and the court refused to give to the jury, the following instruction:

"The court instructs the jury that the defendant is not liable in this case unless you find, from a preponderance of the evidence, that the defendant should have anticipated, prior to June 23, 1913, that plaintiff's intestate or other children would have been attracted to defendant's premises by means of said push-car standing on or near the platform and would have been injured or killed by a railroad train when such children were playing with said push-car."

The declaration charged that the defendant knew, or had reasonable opportunity to know, that for three months prior to the accident children were in the habit of resorting to the platform, playing and pushing the car about, and by nearness of the track to the platform children were liable to be struck by passing trains or to fall down by playing with and pushing the car about and be killed or injured by passing trains. The defendant would only be liable if the circumstances were such that it should have anticipated that children would be attracted to the premises by means of the push-car standing on the platform and would have been injured or killed by a railroad train when playing with the push-car. The justification offered for the refusal of the instruction is that it was not necessary for the defendant to have anticipated that a child might be injured or killed by a railroad train but it was sufficient if it had an opportunity to know that some sort of injury might result to children playing with the car. The courts have been called upon to determine whether an act of negligence was the proximate cause of a resulting injury and have formulated rules for determining what is a proximate cause. It is not necessary to make a negligent act the proximate cause that the particular injury could reasonably have been foreseen, but if the consequences follow in unbroken sequence from

the wrongful act to the injury without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his act or neglect. (*Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *City of Dixon v. Scott*, 181 id. 116; *Chicago Hair and Bristle Co. v. Mueller*, 203 id. 558; *Illinois Central Railroad Co. v. Siler*, 229 id. 390.) The connection of a negligent act with actual consequences does not depend upon the question whether the precise injury complained of or the manner of its occurrence ought to have been foreseen, but it is sufficient that a person of ordinary prudence would have foreseen that his negligence would probably result in consequent injury of some kind. Courts, however, in the trial of issues of fact do not deal merely in abstractions, and both by the pleadings and the evidence in this case there was no question but that if a child was brought in contact with the train by pushing the car about, any negligence of the defendant was the proximate cause. The push-car was not a dangerous agency and in itself contained no element of danger. There was no other possibility of injury that the defendant could have anticipated except that in playing with the push-car a child might be brought into a dangerous place, and the only danger was the existence of the railroad track and passing trains. Besides that fact, the declaration alleged as the ground of liability that the defendant knew, or had reasonable opportunity to know, that one playing with the car might come in contact with trains and be injured, and it was error for the court to refuse to advise the jury that plaintiff was bound to prove his declaration.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE FARMER, dissenting.

(No. 12543.—Reversed and remanded.)

SIMON M. BAUM, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(CONSTANCE TOMCZYK, Defendant in Error.)

Opinion filed June 18, 1919.

1. WORKMEN'S COMPENSATION—*injury need not have been foreseen or expected to arise out of employment.* While there must be some causal relation between the employment and the injury, it is not necessary, in order for an injury to arise out of the employment, that it be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment.

2. SAME—*when an injury while defending employer's business arises out of employment.* An injury to an employee while defending his employer's business from a mob of strikers who have rushed into the place of employment to interrupt the work going on arises out of the employment, where the employee acts as any man ordinarily would in such an emergency.

3. SAME—*when it is the duty of an employee to save lives of his fellow-workmen.* It is the duty of an employee to do what he can to save the lives of his fellow-workmen when all are at the time working in the line of their employment, and the fact that the fellow-workmen are not actually in danger of losing their lives cannot change the rule, if the danger is clearly apparent to the employee and he acts as any man would under the circumstances.

4. SAME—*when assault arises out of employment.* An assault arises out of the employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who are likely to attack him.

5. SAME—*rules of evidence apply to hearing before arbitrator.* The usual rules for producing evidence in any legal proceeding apply to a hearing before an arbitrator under the Workmen's Compensation act.

6. SAME—*proceedings under Compensation act are statutory.* Proceedings under the Workmen's Compensation act are purely statutory and the requirements of the statute must govern them.

7. SAME—*circuit court cannot enter money judgment for compensation and order execution.* Under paragraph (f) of section 19 of the Workmen's Compensation act the circuit court, on writ of *certiorari*, has authority only to confirm or set aside the decision of the Industrial Commission and is not authorized to enter a judgment directing the payment of the amount of the award and ordering execution to issue, as the employee is fully protected by the bond required of the employer by the act.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

JOHN CLARK BAKER, for plaintiff in error.

JOSEPH L. LISACK, (JOHN H. McAULIFFE, of counsel,) for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This writ of error is brought to review a judgment of the circuit court of Cook county confirming an award by the Industrial Commission against Simon M. Baum, plaintiff in error, of compensation for the death of Edward Tomczyk, who died February 25, 1917, from injuries received February 16, 1917, in a difficulty caused by some strikers raiding the factory where deceased was working. The questions raised are, whether the death of Edward Tomczyk arose out of his employment, whether there was error in the admission of certain evidence, and whether the circuit court in confirming the award of the Industrial Commission erred in entering a money judgment and ordering execution.

Deceased was employed by plaintiff in error, doing business as the Nora Shirtwaist Company, as an assistant cutter in his factory located at Milwaukee avenue and Oakley boulevard, in the city of Chicago. The workroom of this factory is triangular in shape, there being about 5000 square feet of floor space in the room. The entrance to this workroom is from Milwaukee avenue through an outer door, down a passageway and through a second door. At the right of the passageway between the avenue and the workroom was Baum's office. At the time of the difficulty there were employed in the workroom two men and about twenty-five women. Plaintiff in error manufactured wash dresses, shirtwaists and other like wash garments. As assistant cut-

ter it was the duty of deceased to lay out goods and cut it with a knife or a power-driven machine. It appears that on January 13, 1917, plaintiff in error received a letter from the International Garment Workers' Union demanding that he sign up with the union to avoid a strike and other difficulty. On February 14 a strike was called by this union, which strike was more or less general throughout the city of Chicago. None of the employees of plaintiff in error were members of this union and there was no strike at this factory and no trouble existed between employer and employees. Two days later, at about 11:45 A. M., twenty or thirty striking members of this union, men and women, rushed through the passageway past the office and into this workroom, calling upon the employees of plaintiff in error to strike. Plaintiff in error was in his office at the time, and when he saw the crowd rushing into his factory he ran to the rear of his office and tried to prevent the crowd from entering his workroom. He seized a hammer, which was taken away from him by the strikers. He then tried to reach his telephone to call the police but was prevented by the strikers. As the crowd forced its way past plaintiff in error, Tomczyk walked around from his cutting table where he was working and tried to hold them back. The plaintiff in error was standing about four feet away from Tomczyk and there were about six male strikers standing between them. The remaining strikers, men and women, were crowded around plaintiff in error, Tomczyk and the forelady, all the women employees of the factory having fled in a panic. In the course of the riot Tomczyk was stabbed and cried out, "Baum! I am cut!" It was from this wound that he died. The strikers left immediately, throwing bricks through the plate glass windows as they went.

The first question is whether Tomczyk's injury, which was received in the course of his employment, arose out of his employment. The words "arising out of" have reference to the cause or origin of the accident and seem

to indicate that the accident must happen out of the transaction of the business in which the workman is engaged. That would include any accident which might naturally result from the manner in which the business is carried on and which would be considered incidental to the employment itself. This injury was clearly a mishap occurring outside of the usual course of events and was an emergency which arose while Tomczyk was engaged in his work. It is well argued that such a situation could hardly have been contemplated by either the employer or the employee when Tomczyk entered the employment of plaintiff in error. On the other hand, when plaintiff in error failed to sign the agreement with the union it was certain to cause the members of the union to use some measure to compel compliance with their demands. It was generally known that there was a strike in the city of Chicago, and this fact was known to the plaintiff in error. Unfortunately, during the course of a strike and in the excitement of events which occur during a strike trouble quite frequently arises. In view of the general conditions and events that were happening in the immediate vicinity of the factory of plaintiff in error it can hardly be said he should not, as a reasonable person, expect some difficulty with the strikers. While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which after the event may be seen to have had its origin in the nature of the employment. Such was our holding in *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31. Where a workman voluntarily performs an act during an emergency which he has reason to believe is in the interest of his employer and is injured thereby, he is not acting beyond the scope of his employment.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning and that plaintiff

in error tried to eject them. The evidence shows that there was great excitement in the workroom and that the women employees fled, screaming, to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow-employees in apparent danger, came to the rescue. He was assisting his employer in the defense of his person and his property and was acting in defense of his fellow-employees, all of whom were women. We have held that it is the duty of an employee to do what he can to save the lives of his fellow-employees when all are at the time working in the line of their employment. (*Dragovich v. Iroquois Iron Co.* 269 Ill. 478.) That the fellow-employees of deceased were not actually in danger of losing their lives cannot change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employees into a panic. It was up to deceased to act or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer and to assist his employer in defending the persons of his women co-workers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employee who is defending his employer's business, it may be inferred the injury arose out of the employment. An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. (*Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96.) Such was the situation in this case. Deceased was assaulted, not for anything he had done but because he was in the employ of the

plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

It appears that plaintiff in error received a letter from the union demanding that he sign up with it to prevent a strike. It was attempted to prove the contents of this letter by oral testimony. This was error. When an arbitrator hears evidence it must be evidence that is competent and legal as tested by the usual rules for producing evidence in any legal proceeding. (*Victor Chemical Works v. Industrial Board*, 274 Ill. 11.) There was, however, competent evidence showing the existence of the strike, and no damage was done plaintiff in error by this ruling. Neither was there any damage done when the plaintiff in error expressed the opinion that deceased was protecting the employer's life and property. He had testified as to what was being done by deceased, and there was sufficient competent evidence to sustain the finding of the commission.

It is contended by plaintiff in error that the circuit court erred in entering a judgment which not only confirmed the award of the commission but also directed the payment of the amount of the award and ordered execution. The proceedings in cases of this character are purely statutory, and it is a settled rule that the requirements of the statute must govern and control them. These proceedings were under paragraph (f) of section 19 of the Compensation act, and the only authority of the court under this paragraph is to confirm or set aside the decision of the Industrial Board. From a consideration of the whole act it would appear that the legislature intended that the employer might protect himself against a judgment for payment of the award by performing certain optional conditions. Paragraph (g) of the same section provides that when the proceedings are under that section "no judgment shall be entered in the

event the employer shall file with the said board its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event the said employer shall fail to prosecute with effect proceedings for review of the decision, or the said decision upon review shall be affirmed." Paragraph (f) of the same section (the one under which these proceedings are brought) provides that the writ of *certiorari* shall not issue until the employer has filed with the circuit clerk "a bond conditioned that if he shall not successfully prosecute said writ or said suit he will pay the said award, and the costs of the proceedings in said court. The amount of the bond shall be fixed by any member of the Industrial Board and the surety or sureties on said bond shall be approved by the clerk of said court." Such a bond was filed in this case. These provisions to prevent judgments are made to avoid incumbering the employer's property with accumulative liens that in many cases would not be discharged for many years and might run for the life of the employee. These judgments might accumulate until the defect in the title of the employer's real estate would make it unmarketable. The employee is fully protected by the bond required by the statute. The court in this case had only such power on *certiorari* as the statute gave, and that was to confirm or set aside the decision of the commission. There is nothing in the statute to authorize a judgment directing the payment of the amount of the award and ordering execution to issue.

The judgment is reversed and the cause remanded, with directions to enter an order confirming the decision of the Industrial Commission.

Reversed and remanded, with directions.

(No. 12640.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. THE CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY, Plaintiff in Error.

Opinion filed June 18, 1919.

1. POLICE POWER—*act of 1913 to provide wash-rooms in certain employments is valid as a police regulation.* The act of 1913 to provide wash-rooms in certain employments applies to all places of employment where the prescribed conditions exist, and as a police regulation and applied to such conditions it is constitutional.

2. MASTER AND SERVANT—*what employments must provide wash-rooms under act of 1913.* The act of 1913 to provide wash-rooms in certain places of employment does not apply to every place of employment in which men become dirty or perspire, but only to those places where they become covered with grease, dust, grime and perspiration to the extent specified in the act.

3. SAME—*what evidence sufficient to render place of employment subject to act of 1913 for providing wash-rooms.* To render a place of employment subject to the act of 1913 for providing wash-rooms for employees who become covered with grease and dirt in their work it is not necessary that there be expert or opinion evidence of probable consequences of ill-health to employees or of offense to the public, but the evidence must be sufficient to justify a jury in drawing an inference of such consequences in the light of common experience.

4. RAILROADS—*when evidence does not show wash-rooms are required in round-house and machine shop.* A round-house and machine shop of a railroad company are not within the act of 1913 for providing wash-rooms in certain places of employment, where the evidence does not show that the employees are in such a condition after leaving their work that without washing and cleansing their bodies and changing their clothing their health will be endangered or their condition be offensive to the public.

THOMPSON, J., dissenting.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Vermilion county; the Hon. WALTER BREWER, Judge, presiding.

GEORGE B. GILLESPIE, (REARICK & MEEKS, and F. L. LITTLETON, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, JOHN H. LEWMAN, State's Attorney, and SUMNER S. ANDERSON, (SAMUEL LEVIN, and B. H. SNYDER, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A complaint was made before a justice of the peace of Vermilion county against the plaintiff in error, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, charging a violation of the act entitled "An act to provide for wash-rooms in certain employments to protect the health of employees and secure public comfort." (Laws of 1913, p. 359.) There was a conviction before the justice of the peace and an appeal to the circuit court, and upon a trial there the jury found the defendant guilty and fixed the penalty at \$50. Judgment was rendered on the verdict and a writ of error was sued out from the Appellate Court for the Third District. The Appellate Court affirmed the judgment, and the record has been brought to this court by writ of error to the Appellate Court.

Section 1 of the act on which the prosecution is based is as follows: "That every owner or operator of a coal mine, steel mill, foundry, machine shop, or other like business in which employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public, shall provide and maintain a suitable and sanitary wash-room at a convenient place in or adjacent to such mine, mill, foundry, shop or other place of employment for the use of such employees." The purpose of the act as

declared by the title is to protect the health of employees and secure the public comfort, and it was enacted under the police power, with suitable provisions against liability to disease or offense to those with whom the employees come in contact after leaving their places of employment. The act applies to all places of employment where the prescribed conditions exist, and as a police regulation and applied to such conditions it is constitutional and valid. (*People v. Solomon*, 265 Ill. 28.) The conditions so prescribed are that the employment is one in which employees become covered with grease, smoke, grime and perspiration to such an extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing will endanger their health or their condition be offensive to the public. If the evidence showed that these conditions existed in the place of employment provided and maintained by the plaintiff in error the judgment was right; if it did not, the judgment was wrong.

The evidence proved these facts: The plaintiff in error is a railroad company and maintains a semi-circular round-house containing twenty-five stalls, twenty-three of which are used for engines and two at one end are separated from the others by a wooden partition and used as a machine shop. In front of the round-house there is a turn-table, upon which engines are swung around to the different stalls into which they are run. An engineer and fireman are employed on each engine, but they have a bucket with them on the engine and wash and change their clothes there and do not go into the round-house. There are from twenty to twenty-five engines, including switch engines, in the round-house every twenty-four hours. About sixty men are employed in the winter and about fifty in the summer. There are two grease-cup men,—one working in the daytime and the other at night,—and two supply men working in a similar way. The grease-cup men carry oil in a can and grease in a bucket and fill the head-lights with oil and clean the

classification lamps and lamps in the engine cabs. They take grease out of the buckets with a putty knife and put it in the grease cups and screw down the caps with a monkey wrench. The supply men oil the engines and fill the lubricators and gauge lamps inside the cabs and take the tools and other things from the engines to the storehouse and bring them back to the engines. These men wear overalls and gloves in their work. The other men are hostlers, firing-up men, boiler washers, machinists and machinists' helpers, who do necessary work on the engines. The men perspire in warm weather about the same as men do at other work. There are eighty steel lockers, and sometimes the men change their clothes before going out and sometimes do not. Sometimes they wear overalls and sometimes do not. The men get more or less dirt and oil on their clothes or overalls and more or less coal smoke on their faces. A deputy factory inspector on August 3, 1916, found some of the men greasy, dirty and sweaty. Each man is furnished with a two-gallon bucket for washing, and there are spigots where they can draw hot or cold water for that purpose, but no wash-room is maintained. There is some smoke and a little dust in the round-house, and the grease-cup men and supply men get some grease and oil on the overalls and gloves which they wear.

The act does not apply to every place of employment in which men become dirty or perspire but only to those where they become covered with grease, smoke, dust, grime and perspiration to the extent specified in the act. In warm weather all persons perspire, whether at work or play, and there are numerous kinds of employment in which the employees get grease on their clothing or become dirty with smoke or dust but not to the extent specified in the act. Neither their health nor the public comfort is involved. That is true of the ordinary blacksmith shop, the garage or the supply house for farm machinery. There was no justifiable inference to be drawn from the evidence that the

employees of the plaintiff in error were in such a condition after leaving their work that without washing and cleansing their bodies and changing their clothing their health would be endangered or their condition be offensive to the public. This is not saying that there must be opinion or expert evidence of such probable consequences nor that a jury may not determine that question from the facts proved in the light of common experience, but the evidence must be sufficient to justify the inference of fact. The evidence did not bring the round-house and machine shop within the terms of the statute.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE THOMPSON, dissenting.

(No. 12490.—Cause transferred.)

ALPHONS H. GITS *et al.* Plaintiffs in Error, *vs.* HENRY ULLRICH *et al.* Defendants in Error.

Opinion filed June 18, 1919.

1. APPEALS AND ERRORS—*when a freehold is not involved.* A freehold is not involved where the title thereto is not put in issue in any manner by the pleadings and there are no assignments of error touching the freehold.

2. SAME—*when freehold is not involved in suit to rescind contract for purchase of land.* A freehold is not involved in a suit to rescind a contract for the purchase of land where the only issues raised by the bill are whether or not there is a partnership existing between the defendants, one of whom made the contract, and whether or not there has been such a breach of the contract as entitles the complainants to tender back the property and have the purchase money returned.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. M. W. PINCKNEY, Judge, presiding.

HAASE, HANLEY & HOWARD, for plaintiffs in error.

MORTON T. CULVER, for defendant in error Henry Ullrich.

HOYNE, O'CONNOR & IRWIN, for defendant in error Emmet F. McElroy.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Cook county sustained a demurrer to the amended and supplemental bill of the complainants, seeking to establish a partnership between the defendants in error in a real estate transaction, to rescind a contract made with one of them and to recover the money paid for the lands by the plaintiffs in error, upon the tender into court of a special warranty deed of the premises in question covering the time the record title has been in the complainants.

The contract in question is in the form of a letter dated Chicago, Illinois, July 21, 1917, addressed to defendant in error Henry Ullrich, alleged in the complainants' bill to have been prepared by or under the direction of Ullrich. After the description of the land in question the letter provides for a total consideration of \$8850, of which \$500 was earnest money and \$4500 was to be paid on demand when a good and sufficient warranty deed and guaranty policy issued by the Chicago Title and Trust Company was delivered, showing the title to be free and clear of all incumbrances. The remaining \$3850 was to be paid in monthly installments of \$500 each. The letter further provides that the complainants were purchasing the premises in question on the following conditions: (1) That the legal survey of sewer datum will be procured, to the end that complainants must be assured good and ample drainage at a depth of six feet below the surface, with an outlet at Fifty-sixth avenue; (2) that an agreement or letter from the People's Gas Light and Coke Company, to the ef-

fect that gas will be furnished on or before May 1, 1918, was to be secured; (3) that an agreement or letter from the water extension department of the city of Chicago be procured, to the effect that water be furnished from the main at Archer avenue; (4) that the defendants would negotiate with the Indiana Harbor Belt Railroad Company for the extension of a lead or side-track to the premises in question. The complainants deposited the sum of \$500 as earnest money and agreed to complete the contract of purchase within thirty days after date of the letter. The complainants further agreed in said letter to furnish from a licensed architect of the city of Chicago full plans, blue-prints and specifications of their proposed manufacturing plant and apply to the defendants for a loan of \$30,000 if that amount were needed and to be furnished a larger amount if necessary, and agreed to pay the loan at the rate of \$2500 each six months until paid. The building was to be completed not later than May 1, 1918. It is further stated in said letter that in case good and perfect title to the premises therein described is not procured, the \$500 paid down as earnest money is to be returned to complainants. The letter is signed by Alphons H. Gits, Remi Gits and Gits Bros. Manufacturing Company. At the time set out in this letter the record title to the premises was in Emmet F. McElroy. The bill alleges that this fact was unknown to the complainants at the time the letter was written and until the delivery of a deed for the property executed by McElroy and his wife. The complainants paid Ullrich \$500 at the time this letter was written and \$4500 at the time of the delivery of the deed to the premises, at which time notes amounting to \$3850 were given, thereby paying the purchase price in full.

It is alleged in the bill of complaint that gas, water or switch-track connections have never been supplied, and that such were necessary to the proper prosecution of complainants' business, without which the land in question would

never have been purchased; that when complainants accepted the deed to the premises Ullrich told them that he was not ready to furnish the contract or agreement from the gas company or the railroad company, for the reason that these things took time, petitions had to be signed and other formalities performed; that he had an established business in Chicago and had had for many years, and that his oral promise for these things was good; that if complainants did accept the deed and pay the consideration he would procure contracts for gas, water and switch-track as soon as possible,—certainly before the first note fell due; that complainants relied on these representations, paid the consideration and accepted the deed for the premises; that Ullrich immediately discounted or otherwise disposed of the notes; that none of the conditions have been performed except to furnish a survey and title guaranty policy; that Ullrich never intended to procure these contracts, but, fraudulently contriving by these promises, at the time induced the complainants to pay cash and give their notes and accept the deed. It is further alleged in the bill that the complainants were engaged in making oil cups; that they had many war contracts with limits and severe penalty clauses; that they occupied leased quarters; that the lease would expire April 30, 1918; that the defendants knew, or should have known, that the complainants would have to have gas and water,—at least these facts were all made known to Ullrich before the making of said offer. The bill further alleges that on September 21, 1917, the complainants notified McElroy and Ullrich of their repudiation and rescission of the contract and made demand for the return of their money. Attached to the bill and made a part thereof are copies of agreements between defendants in error relating to said property and other property, which plaintiffs in error contend establish a partnership between defendants in error.

The first question presented on this record is whether or not this court has jurisdiction to review the case. The

only ground on which a review here may be had on this writ of error is that a freehold is involved. If a freehold is not involved the cause should be transferred to the Appellate Court for the First District. Upon an examination of the record and the issues raised therein we are of the opinion that a freehold is not involved in this case. Plaintiffs in error are seeking to establish a partnership and to have returned to them the money they paid as the purchase price of land because of the failure of Ullrich to perform certain acts which plaintiffs in error say were inducements to them to buy the property. In order to do equity they tender back the property purchased. In a suit for specific performance to compel the execution of a conveyance of a freehold estate a freehold is involved, but plaintiffs in error have not sought such relief in this case. Where the title to the freehold is not put in issue in any manner by the pleadings and there are no assignments of error touching the freehold a freehold is not involved. (*Kesner v. Miesch*, 204 Ill. 320.) A freehold is involved when it is sought to cancel a deed purporting to convey the freehold as a cloud on complainant's title, but no such issue is raised here. The issues raised by the bill in this case are, as we have seen, whether or not there was a partnership existing between defendants in error, and whether or not defendants in error were guilty of a breach of a contract made by one of them and relating not to the freehold but to certain acts to be performed for the benefit of plaintiffs in error, which, they say, induced them to purchase the property. Such issues do not involve a freehold.

The cause will therefore be transferred to the Appellate Court for the First District.

Cause transferred.

(No. 12666.—Reversed and remanded.)

G. A. PAUL, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(CHARLES A. SIMPSON, Admr., Defendant in Error.)

Opinion filed June 18, 1919.

1. WORKMEN'S COMPENSATION—*evidence may be reviewed to determine jurisdiction of commission.* While the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence tending to establish the findings of the commission, yet the evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the act in any given case.

2. SAME—*what is presumptive evidence of filing notice of election to operate under Compensation act.* A certificate from the Industrial Commission approving an employer's compliance with section 26 of the Compensation act, together with his testimony that he had taken out indemnity insurance under the act in response to a notice from the commission and that he concluded to work under the act, constitutes presumptive evidence of the filing of notice of election to come under the act.

3. SAME—*when commission must determine persons entitled to compensation for death of an employee.* Where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation for the death of his employee, it is the duty of the commission to determine the person or persons entitled to compensation, although there is no contest between the respective relatives as to the dependents entitled to the award.

WRIT OF ERROR to the Circuit Court of Christian county; the Hon. J. C. McBRIDE, Judge, presiding.

JOHN J. PRIESTLEY, for plaintiff in error.

J. E. HOGAN, and ARTHUR ROE, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Christian county affirmed the award of the Industrial Commission of Illinois in favor of the defendant in error, Charles A. Simpson, administrator of the estate of Carl A. Simpson, deceased, for injuries re-

ceived by the deceased while in the employment of plaintiff in error. The administrator filed his application for adjustment of claim with the Industrial Commission on behalf of the estate, claiming dependency of himself as father of the deceased, and partial dependency of Alice M. Simpson, mother, and James D. Simpson and Ruth Simpson, brother and sister of the deceased. Upon hearing before the arbitrator duly appointed by the commission an award was entered in favor of the applicant. Upon hearing on review before the commission this award was confirmed. The cause was brought before said circuit court on *certiorari*, as required by the statute, and upon hearing the finding of the commission was affirmed. The circuit court having entered a certificate that the issues herein were proper to be reviewed by this court, the cause is brought here by writ of error.

It is contended by the plaintiff in error that his business does not automatically come under the Workmen's Compensation act, and that he did not elect to provide compensation according to the provisions of the act by filing notice of such election, as required by the statute; that the deceased did not leave any parent, grandparent or grandchild who at the time of the accident in question was dependent upon his earnings, as provided in paragraph (c) of section 7 of the act; that the Industrial Commission erred in not making a finding as to the dependents entitled to receive compensation and the relative dependency of such dependents.

Plaintiff in error is engaged in the hardware, sheet metal work and plumbing business, and said business is conducted in one building and from one office. The employees work wherever they are assigned, and their duties are not restricted to any one part of said business. The deceased was employed generally in the different departments of said business. On July 24, 1917, he was killed by a machine which fell upon him while he was assisting at loading it

onto a wagon. This machine is known as a cornice break and weighed about one ton.

Plaintiff in error's testimony before the arbitrator on the hearing in this cause was to the effect that he had received notice from the Industrial Commission to make provision for accidents or injuries occurring in connection with the operation of his business under said act; that he had complied with said notice by taking out indemnity insurance under the act and had a certificate from the commission that he had fully complied with all the requirements of said act. This certificate of the Industrial Commission was offered in evidence and is in the following language: "You are hereby notified that the Industrial Commission has approved your compliance with section 26 of the Workmen's Compensation act upon proof of same in accordance with the provisions of said act, upon the 16th day of July, 1917." The plaintiff in error also stated to the arbitrator on the hearing, in answer to the question, "In other words, you concluded to work under the Workmen's Compensation act?" "Yes, and I received a certificate from them." This is presumptive evidence of the filing of the notice of election as required by law.

Section 26 of said act provides that an employer who comes under section 3 of the act, or who elects to provide and pay compensation provided for in the act, "shall, within ten days of receipt by the employer of a written demand by the Industrial Board, (1) file with the board a sworn statement showing his financial ability to pay the compensation provided for in this act, normally required to be paid; or (2) furnish security, indemnity or a bond guaranteeing the payment of the employer of the compensation provided for in this act normally required to be paid; or (3) insure to a reasonable amount his normal liability to pay such compensation in some corporation, association or organization authorized, licensed or permitted to do such insurance business in this State."

While, under the general rule, the sufficiency of evidence before the Industrial Commission is not subject to review where there is any evidence tending to establish the findings of the commission, yet questions of the commission's jurisdiction are an exception to this rule. The evidence certified in the record may be reviewed and weighed to determine whether or not the commission has jurisdiction to apply the act in any given case. (*Thede Bros. v. Industrial Com.* 285 Ill. 483; *Hahnemann Hospital v. Industrial Board*, 282 id. 316.) Paragraph (a) of section 1 of the act provides the method by which the employer shall give notice of such an election, as follows: "Election by any employer to provide and pay compensation according to the provisions of this act shall be made by the employer filing notice of such election with the Industrial Board." However, whether or not an employer elects to operate under the act is a question of fact. Paragraph (a) requires that notice of such election shall be filed with the commission but does not prescribe a particular form of notice to be used, and where the employer, as in this case, upon the receipt of a demand that he comply with section 26, satisfies the commission of such compliance and receives its certificate to that effect,—which action on his part he explains as having been the result of his determination to operate under the act,—he cannot be heard to say that he had not elected to come under the act merely because he had not filed formal notice of such election with the commission. The Industrial Commission had jurisdiction in this case.

The plaintiff in error having elected to come under the Workmen's Compensation act, it is not material to discuss whether or not his business brought him automatically under said act.

The arbitrator found from the evidence that the deceased left him surviving his father, mother, brother and sister; that the father was not able to earn sufficient, com-

pensation to support himself and family; that the sister was a minor and the brother was in ill-health; that the entire earnings of the deceased was paid to the mother, to be applied to the necessary support and living expenses of the entire family; that the other brother worked a portion of the time and likewise turned over his earnings to the mother for the same purpose; that the mother had no money in the bank; that all, or substantially all, of the earnings of the deceased was expended in the support of the family, along with other moneys given to the mother by the father and the other brother; that the deceased was sixteen years old at the time of the injury resulting in death; that the injury arose out of and in the course of his employment with the plaintiff in error. The arbitrator gave the minimum award, payable in 275 weeks at six dollars per week, provided in paragraph (c) of section 7 of the act. On a hearing on review the award of the arbitrator was confirmed and declared to be the decision of the commission. There was competent evidence in the record upon which to base such finding.

The award was allowed to the administrator. The Industrial Commission in allowing the award did not determine which of the foregoing relatives were dependent upon the deceased employee. While there is no contest between the respective relatives as to the dependents entitled to the payment of the award, nevertheless where there is no voluntary payment on the part of the employer and the Industrial Commission must determine the compensation, it is the duty of the commission to determine the person or persons entitled to the compensation. *Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34.

The judgment of the circuit court will be reversed and the cause remanded to that court, with directions to remand the same to the Industrial Commission for further proceedings consistent with the views herein set forth.

Reversed and remanded, with directions.

(No. 12662.—Decree affirmed.)

N. MIEDEMA *et al.* Defendants in Error, *vs.* H. D. WORMHOUDT *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919.

1. SPECIFIC PERFORMANCE—*right to specific performance rests in discretion of court, subject to principles of equity.* The right to a specific performance of a contract is not absolute but rests in the discretion of the court, subject to the settled principles of equity.

2. SAME—*contract to convey may be enforced although inconvenient to grantors.* The object of courts of equity, as well as courts of law, is the enforcement of contracts rather than their evasion, and where a contract for the sale of land is fairly and understandingly entered into, a court of equity will enforce the contract although its performance may require the grantors to purchase from a third party before they are ready to do so.

3. SAME—*performance may be enforced where beneficial owner contracts to convey.* In equity the vendor of land contracted to be sold is regarded as a trustee for the vendee, who is regarded as the equitable owner, and where the purchaser disposes of his interest in the land, either by an assignment of the contract for a deed or by the execution of a new contract to convey to a third party, a court of chancery will decree specific performance of the contract by the beneficial owner or the one who holds the title for his benefit.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. CHARLES M. FOELL, Judge, presiding.

FRED B. SILSBEE, for plaintiffs in error.

JOHN A. McKEOWN, for defendants in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

On August 26, 1916, plaintiffs in error, H. D. Wormhoudt and A. J. Kuyper, entered into a contract with E. R. Tallmadge for the exchange of about 2073 acres of land which Tallmadge owned in Kankakee county for 2720 acres which the plaintiffs in error owned in Manitoba, Canada.

In consideration of the conveyance to them of the lands in Kankakee county the plaintiffs in error agreed to convey to Tallmadge the Canada lands and to pay in addition the sum of \$200,000,—\$20,000 on or before two years after the date of the agreement and the remainder in installments thereafter. Tallmadge agreed, as soon as the payment of \$20,000 had been made, to convey the Kankakee county lands to the plaintiffs in error and accept notes and trust deeds from them for the unpaid balance of the purchase money. It was provided that as the plaintiffs in error desired to sell and colonize the lands in Kankakee county and might desire to have portions thereof conveyed by Tallmadge, under the contract, before the payment of the \$20,000 and might after the execution of the trust deed desire to have portions of the lands released from the lien thereof, for the purpose of such conveyance and release the lands might be divided into seven parcels, and that on receiving in cash the amount per acre placed opposite the parcels, respectively, Tallmadge would convey any one of the parcels. All of the lands were situated in town 30, north, range 11, west, and the north half of the northeast quarter of section 10 was designated as "Parcel C," opposite which the amount per acre was \$150. On October 5, 1916, the plaintiffs in error entered into a contract with the defendants in error whereby the plaintiffs in error agreed to convey to the defendants in error 40 acres of "Parcel C" for \$7500, of which \$25 was paid in cash, \$475 was to be paid on December 1, 1916, and the remainder in installments falling due at later dates. This contract provided that a warranty deed should be delivered as soon as \$3500 of the purchase price had been paid in cash and notes secured by a trust deed had been delivered to the vendors. On March 19, 1918, the defendants in error tendered to the plaintiffs in error the balance payable under the terms of the contract, except \$4000, and offered to give a note secured by a trust deed for this sum and demanded that the

plaintiffs in error convey the premises to them. The plaintiffs in error refused to accept the money and the note and refused to execute a deed. Thereupon the defendants in error filed a bill in the superior court of Cook county to compel the specific performance of the contract by plaintiffs in error. Tallmadge was made a defendant to the bill and answered, admitting its allegations, stating that he was able and willing to comply with the terms of his contract with the plaintiffs in error and to convey to the plaintiffs in error the lands described in the bill, together with the other lands which the plaintiffs in error agreed to purchase from him by their contract. The cause was heard, the court entered a decree for the specific performance of the contract, and the plaintiffs in error have sued out a writ of error.

The objection of plaintiffs in error to the decree is, that the court, in decreeing specific performance, did not exercise a wise discretion, because the defendants did not have title to the 40 acres of land in controversy and could not obtain title without purchasing the whole of "Parcel C," which consisted of 80 acres, and that under the circumstances the decree of specific performance produced hardship and injustice to the defendants. The defendants in error did not pay the \$475 which was due on December 1, 1916, but they paid \$275 of that amount and are also entitled to a further credit of \$60 on the contract. They took possession of the land on March 1, 1917, and have ever since been in possession of it, have improved and cultivated it, and the defendant in error N. Miedema has continuously resided on it.

It is not argued that the rights of the defendants in error were forfeited by reason of their failure to comply with the contract or that their tender of performance on March 19, 1918, was not sufficient. The defense is based wholly on two propositions: First, that the decree of specific performance does not subserve the ends of justice but produces

hardship and injustice to the defendants; second, that the defendants had no title to the land. It has been often said the right to a specific performance of a contract is not absolute but rests in the discretion of the court. This discretion, however, is controlled by settled principles of equity, and where a valid contract exists for a sale of land a court of equity will enforce it as a matter of right where it was fairly and understandingly entered into and no circumstances of oppression or fraud appear. (*Anderson v. Anderson*, 251 Ill. 415; *Adams v. Larson*, 279 id. 268.) The object of courts of equity, as well as courts of law, is the enforcement of contracts rather than their evasion. Ordinarily the specific performance of a contract to convey land is as much a matter of course as an action of damages for its breach. (*Cumberledge v. Brooks*, 235 Ill. 249.) The hardship of which the plaintiffs in error complain is, that in order to acquire the title to the 40 acres which they have agreed to convey to defendants in error for \$187.50 an acre, they would have to complete the purchase of the 80 acres of which it is a part at \$150 an acre when there was nothing due on their contract for five months. The plaintiffs in error contracted to convey this 40 acres of land whenever they were paid \$3500, and the remaining \$4000 was secured by a note and mortgage on the premises. They knew when they made the contract that they could only acquire the title to the 40 acres, so as to comply with their contract, by obtaining a deed for the whole 80 acres for \$12,000. They sold the land to the defendants in error at a profit of \$37.50 an acre, and there is no hardship or oppression in compelling them to do what they agreed to do when they thought it was for their advantage. They were competent to contract, they did fairly contract, and they ought not to be relieved from their agreement because it is not convenient to perform it.

As far as the objection that the plaintiffs in error did not have the title to the land is concerned, the doctrine of

equity is that the vendor of land contracted to be sold is regarded as a trustee for the vendee, who is regarded as the equitable owner of the land. The purchaser can dispose of his interest in the land either by an assignment of his contract for a deed or by the execution of a new contract to convey, and a court of chancery will decree a specific performance of the contract by the beneficial owner or the vendor who holds the title for his benefit. *Waggoner v. Saether*, 267 Ill. 32.

The decree is affirmed.

Decree affirmed.

(No. 12603.—Judgment affirmed.)

WILLIAM ALLOTT, Appellant, vs. THE WILMINGTON LIGHT
AND POWER COMPANY, Appellee.

Opinion filed June 18, 1919.

1. **WATERS**—owner of land bordering river has title to center of stream. Grants of land bordering upon a river give title to the grantee to the center of the stream unless by the terms of the grant an intention is clearly shown to stop at the stream's edge; and this is true even though plats or descriptions attempting to describe the property state that it is of a certain width or length.

2. **SAME**—fact that a stream was meandered by governmental surveyors tends to show it was a river channel. Meander lines are used ordinarily only in surveying lands adjacent to a stream, whether navigable or not, and the fact that a stream was meandered by government surveyors tends to show that they considered it a river channel when the survey was made.

3. **SAME**—owners of land bordering river have easement for discharge of water from tail-race. The owners of land bordering upon a river have a right to have water flow into the stream from the tail-race of a mill on their property.

4. **EJECTMENT**—plaintiff in ejectment must recover on strength of his title. The plaintiff in an ejectment proceeding must recover on the strength of his own title and not on the weakness of the title of his adversary, and unless the plaintiff proves title in himself he cannot take any advantage of the failure of the defendant to prove title.

5. *SAME—proof must correspond with declaration.* The proof must correspond with the declaration in an action of ejectment, and where the declaration distinctly states that the plaintiff asks only for the recovery of property west of the west boundary of certain lots the plaintiff cannot recover any portion of the lots.

APPEAL from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding.

ROBERT E. HALEY, (P. C. HALEY, of counsel,) for appellant.

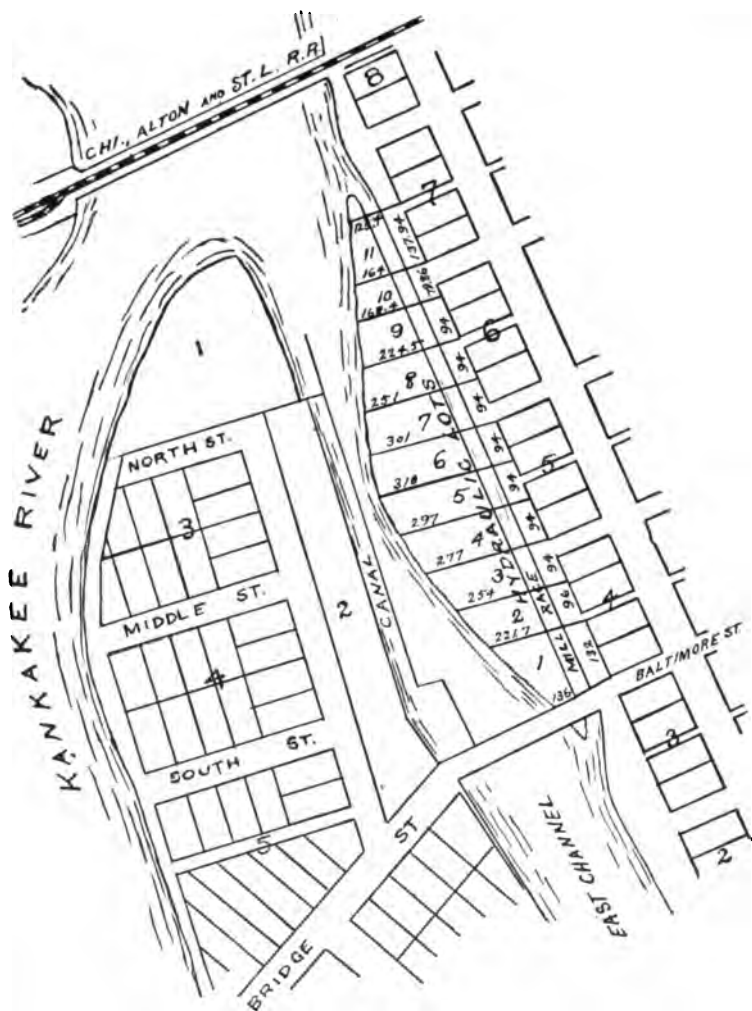
O'DONNELL, DONOVAN & BRAY, and CORLETT & CLARE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action in ejectment brought by appellant, William Allott, in the circuit court of Will county, against appellee, the Wilmington Light and Power Company, to recover possession of a certain strip of land in said county. The declaration was the usual form, and appellee filed a plea of general issue and a special plea. The case has been twice tried in the circuit court. On the first trial, at the close of the case, the court directed a verdict for appellee. Appellant thereupon obtained a new trial under the statute, at which a jury was waived and the case submitted to a different circuit judge from the one who originally tried the case, and the court found the issues for the appellee and entered judgment accordingly. This appeal followed.

The land involved in this litigation lies along the Kanakee river, in the city of Wilmington. The river at this point runs slightly west of north, but for convenience we shall speak of it as if it ran north through said city. The premises in controversy were described in the declaration as follows: "The strip of land lying between block 2 of Alden's Island addition to Wilmington on the west, and the west line of water lots 1 and 2 of Cox & Bowen's Water Lot addition to the city of Wilmington, in said county." A

plat showing approximately the situation and surroundings of this strip of land is given herewith, not for the purpose of mapping accurately the disputed property, but to aid in obtaining a clear understanding of the matters in dispute:



Litigation involving certain rights connected with this locality has heretofore been before this court in *Allott v. American Strawboard Co.* 267 Ill. 272, and a plat of the

locality embracing a larger territory than the one here given will be found on page 276 of that opinion.

In 1838 the land in Water Lot addition to said city was owned by Cox & Bowen. They platted lots 1 and 2, along with nine other lots extending north from said lot 2 and ending with lot 11, the plat being made by the then county surveyor of said county, Addison Collins. A copy of the original plat was introduced in evidence, and the certificate of the surveyor thereto reads as follows: "I hereby certify that I have surveyed and actually laid out eleven water lots added to Wilmington for Thos. & Joseph Cox & A. W. Bowen adjoining their town platt & that this platt is the original and correct platt of said addition; that the lots are the dimensions in feet, respectively, as marked in figures on this platt; that the east side of said addition extends from the southwest corner of lot 1 in block 4 to the southwest corner of lot 2 in block 7, at each end of said line are stones sunk as monuments, and that a mill-race about 55 feet wide extends over said lots from the south to the north end of said addition." On the western border of all of these lots on the plat are the words "Kankakee river." The side lines of the various lots are parallel to each other and not far from perpendicular to the line marked as the Kankakee river, and the lengths of the respective lots apparently conform to the course of the river, the middle lots of the subdivision being longer and the lots toward each end being shorter.

The principal contention between counsel with reference to this litigation is as to where the western boundary line of lots 1 and 2 was located by this plat. It is argued by counsel for appellant that the boundary line was to be found by measuring the distance given on the plat as the length of each lot from the east boundary line of such lot as given on the plat, the east boundary line of the row of lots being marked at the north and south ends by stones placed in the ground, which can still be located. It is contended by coun-

sel for appellee, on the other hand, that the west boundary lines of these lots were not fixed by means of the distance stated on the plat as to the length of these lots but that the line was fixed by the plat as the Kankakee river, and hence the center thread of the Kankakee river was the western line of said lots.

As will be seen from an examination of all the plats submitted on the trial of this case as to the locality in question, the Kankakee river a short distance south of this point is divided into two branches by what has long been known as Alden's island, that on the west having been known as the west or main channel of the Kankakee river, while that on the east, immediately adjoining said lots, has been known as the east channel. As we understand the argument of counsel for appellant, they contend that the evidence in this record shows that there was never, in reality, any east channel of the river; that east of Alden's island was simply a depression, through which in times of high water the water flowed; that no water flowed continually through there. Whether this be true or not, we do not consider it decisive of the question as to where the west boundary line of lots 1 and 2 is located. That must be decided, largely, on the basis of what was understood with reference to whether there was a river directly west of the property as platted in Water Lot addition, made in 1838. The evidence in the record, in our judgment, tends strongly to show that from the earliest time since this section was settled it was understood that there were two channels to the Kankakee river,—one on either side of said island,—and that all the plats have so indicated. There is merit in the argument of counsel for appellee that the question whether the west boundary of these lots was the east branch of the Kankakee river was settled by this court in *Allott v. American Strawboard Co.* *supra*, where we said (p. 276): "In 1838 Thomas Cox, Joseph Cox and Albert W. Bowen, while owning, as tenants in common, Alden's island and all other lands riparian

to the east channel of the river, laid out into lots and plat-
ted a tract of land lying along the east side of the east chan-
nel of the river opposite the north part of Alden's island,
calling the same 'Water lots added to Wilmington.' These
lots were eleven in number, the most southerly being num-
bered 1, and the remaining lots, extending in a northerly
direction from lot 1, being numbered consecutively to and
including lot 11. Certain figures indicating the dimensions
of each lot appeared on the plat, but the western boundary
of each lot as shown on such plat is the east branch of the
Kankakee river."

Counsel for appellant contend that the questions here in-
volved were not raised or considered in the case quoted
from, and that the statement in the opinion that the "west-
ern boundary of each lot as shown on such plat is the east
branch of the Kankakee river" was unnecessary to the de-
cision of the case. With this we cannot agree. It is clear
from the last paragraph of the opinion, beginning at the
bottom of page 300, that the question whether these lots
were riparian to the river was necessary for the decision
of some of the questions involved therein. The court stated
in that paragraph: "As against water lot owners appellees
have no right to interfere with the maintenance of dam
No. 3 nor to obstruct the flow of water diverted by that
dam into the east channel, and water lot owners have the
right to peaceably remove obstructions placed in the east
channel by appellees. (*Schmidt v. Brown*, 226 Ill. 590.)
Appellees contend, however, that the water wheels of the
American Strawboard Company are not located on any of
the water lots, and that company, therefore, cannot jus-
tify its action in removing the obstructions on the ground
that it was exercising its rights as a water lot owner.
The American Strawboard Company is the owner of water
lots 3, 4, 5, 6, 7, 10 and 11 and a part of water lot 9, and
as such owner has a clear right to the unobstructed flow
of water into and through the east channel. Whether it

is wrongfully using water from the mill-race is a question which does not concern appellees but can only be raised by another water lot owner." Manifestly, if these water lots ended on the western boundary at a distance measured on said plat and not at the Kankakee river, what is here said as to the rights of the water lot owners would not have been correctly stated. The same attorneys appeared for appellant, Allott, in the former litigation between appellant and others and the American Strawboard Company, decided in the opinion just referred to, and the briefs of Allott in that case and his petition for rehearing clearly raised the question that certain of the water lots in Cox & Bowen's Water Lot addition to Wilmington were not riparian to the east channel of the Kankakee river. In the petition for rehearing his counsel urged that the opinion was wrong because of this fact. There can be no question that a vital part of the decision in that case depended upon whether the owners of these water lots had any rights in the water flowing through the east channel at this point, and that, in its turn, depended on whether their lots extended to the east channel and were bordered thereby. If the western boundary of said lots was the east channel of the river, then the western boundary of said lots, under the settled authorities in this and other jurisdictions, was the center thread of the east channel. We see no reason to depart from our holding in that case as to the western boundary of the lots being the east channel of the Kankakee river. That it has always been the understanding that the east channel was really a river is corroborated by the reasoning in *People v. Kankakee River Improvement Co.* 103 Ill. 491, where this court said (p. 511): "We do not understand that this provision would apply. It does not respect rivers, and we do not consider that a river becomes a canal from having its navigation improved by artificial means." A reading of the entire opinion in that case shows, without question, that the court was discussing the artificial channel that was constructed in the

so-called east channel of the Kankakee river from Baltimore to Bridge street north along the eastern boundary of block 2 on Alden's island, marked on the plat herein "Canal." Counsel for appellant, however, have argued so strenuously with reference to the western boundary of the water lots that we have decided to consider that question at some length as if it had not been considered and decided in the former decisions of this court.

Cox & Bowen's Water Lot addition to Wilmington (which we will so term for convenience regardless of its technical name, as to which the briefs differ,) was the first platted land immediately adjoining the property in dispute. Later the owners of the island platted the Island addition to Wilmington, including block 2 in said addition, shown in a general way on the plat accompanying this opinion. The witnesses who testified as to the location of the early buildings on lots 1 and 2 and the surrounding property did not agree fully in all particulars as to the time when such buildings were erected or the way in which the business was operated. This is not remarkable, as memory, everyone knows, is faulty, and we have little doubt that the witnesses were stating, as best they remembered, the exact situation on all these matters. A flour mill was evidently the first building constructed on lot 1 in said Water Lot addition, built, apparently, some time before 1860. This mill seems to have been destroyed by a flood in the east channel, and later a new grist mill, called the White Cloud mill, was erected practically on the same foundation as the old mill between 1870 and 1880. At about the same time appellee or its predecessor erected an electric light plant on water lot 2. A dam had theretofore been constructed across the east channel of the Kankakee river immediately south of the south line of water lot 1, extending west, being at the place designated on the plat as Baltimore street, which on Alden's island is called Bridge street, and serving both as a dam and a highway. Some years before the beginning

of this litigation appellee purchased a part, if not all, of lot 1, upon which the White Cloud grist mill was located, and prior to 1907 started to construct a new electric light plant on the foundations of the old White Cloud mill. These old grist mills on lot 1 were operated by water power, receiving water from the east branch of the Kankakee river through an opening under Baltimore (or Bridge) street and discharging it out of the west side of the mill. In 1861 the Kankakee Company, for the purpose of improving for navigation the east branch of the Kankakee river, deepened that portion of the east channel north of Baltimore street (marked as "Canal" in the plat) and adjoining block 2 on Alden's island, and this part of the channel was again deepened in 1870. The dirt and rock then excavated were mostly thrown on the east side of the deepened portion, but apparently some of it was thrown on the east side of block 2 of the Island addition, which lies just west of the deepened portion. At the time this channel was deepened the testimony tends to show that the east channel was wider just north of Baltimore street than it was farther north, and apparently an expansion was made in the deepened portion immediately north of Baltimore street, which was known as the "basin" and was used for the turning of boats, as navigation apparently did not extend south of Baltimore street until after the lock was constructed there, about 1870. On the east side of this portion of the east channel or canal, some time about the early seventies, there was a stone wall constructed, as some of the witnesses testified, to prevent the water discharged from the mill located on water lot 1 from driving against the boats in the basin, and after that the water coming out of the mill on water lot 1 ran west to the wall and then north along the wall, ultimately emptying into the east channel of the Kankakee river. There is testimony, however, on behalf of appellant which tends to show that some of the water, at least, used in the grist mills on water lot 1 ran northwesterly from the

mills across lot 1 and did not reach the east branch of the Kankakee river until it had run about as far north as water lot 8. The deepened portion of the east channel was thereafter called the "canal," and is so noted on some of the plats introduced in evidence and on the plat accompanying this opinion. There is also testimony from a former owner of water lot 2, who operated a grist mill thereon, that the water discharged from his mill ran south from lot 2 to a tail-race leading from the grist mill on water lot 1 and then ran west in the tail-race to the river. There is testimony in the record on behalf of appellee which tends strongly to show that during all the time the grist mills were being operated on water lot 1 the water used by said mills ran directly into the east channel of the Kankakee river, both before and after the deepening of said channel. The evidence before us also tends to show that many of the deeds transferring the property, or portions of it as located on the Water Lot addition to Wilmington, intended to convey said property because it was being used for water power purposes and along with the property intended to convey such water power rights.

There can be no question that grants of land bordering upon a river give exclusive right and title to the grantee to the center of the stream unless by the terms of the grant an intention is clearly shown to stop at the stream's edge. This rule has been laid down by this court in *Houck v. Yates*, 82 Ill. 179, *Davenport and Rock Island Bridge Railway and Terminal Co. v. Johnson*, 188 id. 472, *Village of Brooklyn v. Smith*, 104 id. 429, *Chicago, Rock Island and Pacific Railway Co. v. People*, 222 id. 427, and *Peoria Gas and Electric Co. v. Dunbar*, 234 id. 502. This has been held to be true even though plats or descriptions attempting to describe the property stated that it was a certain width or length. In *Chicago, Rock Island and Pacific Railway Co. v. People*, *supra*, the court said (p. 434): "It is true the certificate states that Water street is 110 feet in width,

but the decisions in this State hold that when a street is bounded on one side by a river, even though the plat gives its width in actual figures, it extends to the center of the river." In *Peoria Gas and Electric Co. v. Dunbar*, *supra*, the plat in evidence showed that the length of a certain lot was 110 feet, and it was argued that if the ownership extended to the center thread of the stream it would give a lot 240 feet in length, which would be most unreasonable. In disposing of that contention the court said (p. 503): "It is also well settled by numerous decisions of this court that where natural monuments or boundaries are mentioned in conveyances such monuments or boundaries control over distances. In this case lot 4 in block 51 is conveyed by a plat showing that this lot extends to the Illinois river. The distance, 110 feet, mentioned on the plat must give way to the natural monuments. This would be true even if the conditions when the plat was made were the same as they are now. The reasonable inference is that in 1836, when the plat was made, the distance from Water street to the river was approximately 110 feet, and that the natural accumulations have extended the lot to its present length."

Counsel for appellant concede that this is the law generally, but insist that the law cannot be applied to the facts in this case for the reason that the western lines of lots 1 and 2 do not extend to the east bank of the east branch; that the evidence introduced on the trial, both written and oral, tends to show that the intention and purpose of the proprietors of the Water Lot addition was to limit the size of the lots to the dimensions noted on Cox & Bowen's plat of the Water Lot addition. Said plat, which was introduced in evidence, shows that the length of the eleven water lots varied, according to the turnings or sinuosities of the east branch of the Kankakee river. There is nothing in the record to disclose that there was any intention to limit the length of these lots except as they were limited by the course of the river. Then, too, the east line was marked by

monuments at its north and south ends, and no such fixed marks or monuments were located at the western boundaries of any of these lots. In view of the situation and surroundings we think it is clear that if the original owners had intended to limit the western boundaries to the distances marked upon the plat they would have located fixed monuments there. There can be no question that at that time the eastern channel of the Kankakee river was immediately adjacent to the west boundary lines of these lots as marked on said plat. The certificate described these lots as water lots, and all the public plats introduced in this record, as well as all the conveyances which have reference to this property, indicate an intent on the part of the proprietors to make use of them as water lots and to claim and exercise for themselves the water rights connected with the water lots. In our judgment the great weight of the evidence in this record shows clearly that the western boundary of these lots was intended to be the east branch of the Kankakee river, and therefore these lots extended to the center thread of said east branch. Nothing is said by this court in *Kinsella v. Stephenson*, 265 Ill. 369, cited and relied on by counsel for appellant, in view of the facts in that case, which in any way conflicts with this conclusion.

The evidence in this record shows that the east channel was meandered when it was originally surveyed by the government, and meander lines are used usually only in surveying lands adjacent to a stream, whether navigable or not. (4 R. C. L. 97; 9 Corpus Juris, 189.) The fact that this channel was meandered tends strongly to show that the government surveyors considered that it was a river channel at the time the survey was made. There was also introduced in evidence a memorandum from a book in the recorder's office in Will county, apparently made at the time of one of these original surveys, which gives the width of the Kankakee river and the width of the "smaller channel

which lies on the east, as two chains and fifty links, September 11, 1821." While it is true there is evidence in the record tending to show that large trees were growing west of the west boundary lines of lots 1 and 2 on the east bank of the channel, if the measurements on Cox & Bowen's Water Lot addition be considered as giving the correct lengths, still, in our judgment the evidence is conclusive that this east channel was meandered as a flowing stream by the government originally, and this has always been considered as the east branch of the Kankakee river by all people who have platted this locality, and it has been so understood in practically all deeds conveying any property adjacent to or bordering on said east channel.

The evidence tends to show, as argued by counsel for the appellant, that the plant of the appellee company as now constructed on water lot 1 extends west of the western boundary of said lot according to the distance marked on the original plat as to the length of lot 1. It is also true, as argued by counsel for appellant, that the record does not show from the government down a complete chain of title in appellee to the land in dispute. But it has been repeatedly held by this court that the plaintiff in an ejectment proceeding must recover on the strength of his own title and not on the weakness of his adversary's title. (*Hammond v. Shepard*, 186 Ill. 235; *Phelps v. Nazworthy*, 226 id. 254; *Terhune v. Porter*, 212 id. 595.) In the case last cited the court said, at the bottom of page 595, after citing authorities: "Unless the plaintiff proved title in herself the defendants could not be disturbed in the possession of the land, whether they had any title or not." Therefore in this proceeding, unless appellant proved title to the disputed strip in himself he could not take any advantage of the failure of appellee to prove valid title in itself. Obviously, under the facts and authorities already stated and cited, when the original owners of the disputed strip platted, in 1838, the Water Lot addition to Wilmington, in-

cluding lots 1 and 2, the western boundary of said lots extended to the center thread of the east branch of the Kankakee river, and therefore, when appellant attempted to obtain title in 1908 from Edward Alden to this strip between the center thread and west boundary lines of lots 1 and 2, he received no title to said strip as Alden had no title to convey; and this is conceded to be true, as we understand the arguments of counsel for appellant, if in making the original plat, in 1838, Cox & Bowen intended that the lots should extend to the east branch of the Kankakee river. Appellant is not entitled to recover any part of water lots 1 and 2 under this declaration, for the declaration distinctly states that he only asks to recover property west of the west lines of water lots 1 and 2. The proof must correspond to the declaration. Hurd's Stat. 1917, secs. 10, 22, pp. 1235, 1236; 5 Ency. of Evidence, 28, and cases cited in note 85; *Schoonmaker v. Doolittle*, 118 Ill. 605.

It is argued most earnestly by counsel for appellee that it is properly entitled to judgment in this case as to the disputed strip east of the center thread of the east channel because the proof shows that it has had hostile and adverse possession of the strip for more than twenty years before the commencement of this litigation. In view of the conclusion that we have reached as to the failure of appellant to prove any right to the property in dispute between the center thread of the east branch and the west boundary lines of lots 1 and 2, it is not necessary for us to discuss or decide the question of title by adverse possession. Neither is it necessary for us to decide the questions raised by appellant on the law of adverse possession, as stated by the propositions of law held or refused by the trial court.

Counsel for appellant argue that the judgment of the court in effect gave title to appellee to property west of the east channel of the Kankakee river. We do not so understand the record. In the special plea filed by appellee it disclaimed any right to possession of any land lying west

of the east branch of the Kankakee river as it existed at the commencement of this suit, except an easement to discharge water into that branch of the river. There can be no question that the owners of water lots 1 and 2, if their western boundary extended to the center-thread of the east channel of the river, would have a right to have water flow from the tail-race on their property into the east branch and thereafter into the main channel of the river at the north end of Alden's island. Under the judgment rendered by the trial court appellee would have no rights additional to those claimed by it in its special plea.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 11429.—Rule made absolute.)

THE PEOPLE *ex rel.* The Chicago Bar Association, Relator,
vs. C. V. DONOVAN, Respondent.

Opinion filed June 18, 1919.

1. DISBARMENT—*when previous good character should not control decision of court.* While the good character of the respondent previous to the alleged offense should be taken into consideration in a disbarment proceeding it should not be allowed to control the decision of the court, where the facts established as to the alleged misconduct show a gross breach of the law and the ethics of the profession.

2. SAME—*public is entitled to high standard of integrity in legal profession.* As the relation of attorney and client is a fiduciary one the public has a right to the maintenance on the part of the legal profession of a high standard of integrity among its members, and the duty rests upon the Supreme Court to assist in the maintenance of that standard.

INFORMATION to disbar.

JOHN L. FOGLE, for relator.

CHARLES E. SELLECK, for respondent.

Mr. JUSTICE STONE delivered the opinion of the court:

The People, on relation of the Chicago Bar Association, leave of court having been obtained, filed an information to disbar the respondent. The information consists of one count, and charges that the respondent entered into an unlawful and fraudulent conspiracy with one Hoffman, who is a trusted employee of a certain casualty insurance company, to secure settlement with said insurance company of the claim of Nick Soter, who was injured while in the employ of O. W. Rosenthal & Co., a corporation of Chicago, while in the performance of his duties as a laborer for said company. The information further charges that the respondent having secured a settlement of the claim for compensation for Soter for \$1103.30, of which, under his contract with Soter, he was to pay Soter \$450, he nevertheless paid nothing to Soter but lost the money through becoming intoxicated. It is further charged on information and belief that the conspiracy between the respondent and Hoffman was to the effect that all money received on the claim of Soter over and above the claim of \$450 was to be divided between the respondent and Hoffman. It is further charged that no part of the money procured by the respondent had been paid to Soter, though the information was filed more than three months after the money was procured. Respondent filed his answer, in which he denies any conspiracy but claims the loss of his client's money was due to his intoxication and without any intention on his part to fail or avoid making proper payment thereof to his client. He also avers in his answer that his contract with Soter was to the effect that he should receive one-half of all money over \$450 collected on the claim.

The matter was referred to John W. Ellis, master in chancery of the circuit court, who took the evidence and reported the same to this court with his conclusions of law and fact thereon. It appears from the evidence in the

case that the respondent was by this court admitted and licensed to practice as an attorney in this State on June 10, 1896, and that since that date he has been engaged in the practice of law in the city of Chicago. The evidence also shows, and the commissioner reported, that on the 14th day of June, 1916, Nick Soter, who it appears is a Serbian, unable to speak or write the English language, was injured while in the employ of O. W. Rosenthal & Co.; that he thereafter made claim upon his employer, which claim was referred to the Union Casualty Company, an insurance company selling casualty policies; that through the assistance of W. Rubenstein, a friend of Soter, payments were made from time to time pursuant to the Workmen's Compensation law; that an agreement was made between the insurance company and Soter for a lump sum settlement of his claim for compensation in the sum of \$450; that the lump sum settlement was not paid, and Soter, with his friend, Rubenstein, from time to time called on the representative of the insurance company and urged payment of his claim; that on or about September 1, 1916, he and his friend again called upon the insurance company and there talked with J. H. W. Hoffman, who, though employed by another attorney, was devoting his attention especially to the work of said insurance company. It appears from the evidence of the relator that Hoffman suggested that he would obtain for Soter a lawyer who would be able to secure the money claimed by him; that as a result of said suggestion Soter and Rubenstein called upon the respondent and retained him as attorney to make the collection. It is denied by the respondent, but the commissioner finds, that Hoffman accompanied Rubenstein and Soter to respondent's office and there suggested that they employ respondent as attorney. It further appears that respondent prepared in his own handwriting a proposition to himself as an attorney at law, which was signed by Soter, authorizing respondent to act as his attorney; that the proposition contained

the words, "and you are hereby authorized to retain from any money received or secured for me in said matter all moneys over and above the sum of \$450 for your share of compensation for service rendered or to be rendered in my behalf." The instrument, when offered in evidence on the hearing herein, appeared to have been altered in the handwriting of the respondent by the insertion of "½ of," preceding the words "all moneys over and above." Respondent insists that the alteration was made before the proposition was signed, and the commissioner reports that he is unable to determine from the evidence when such alteration was made. It further appears from the evidence that on the day after the respondent was so retained as attorney by Soter, respondent, Hoffman, Soter and his friend, Rubenstein, appeared before the Industrial Board and secured an order of settlement by said board in the sum of \$1103.30; that said sum was advanced by Rosenthal & Co., with the understanding and agreement that it be later reimbursed by the insurance company; that on the next day a check for \$1103.30 was made by Rosenthal & Co. payable to the order of respondent, as attorney for Soter, and delivered to respondent. The evidence further shows that on December 23, 1916, on the complaint of John T. Bryne that the sum of \$603.30 of the settlement so made had been divided between respondent and others, a further hearing was had before the board, as a result of which the matter was referred to the grievance committee of the Chicago Bar Association. It further appears from the evidence that after receiving the check for \$1103.30 the respondent cashed the same at the Boston Store, in the city of Chicago, and received thereon the amount in currency, and that without making any payment whatever to Soter the respondent began to drink intoxicating liquors and became intoxicated and in some manner lost the money, and that no payment thereof was made to Soter until long after disbarment proceedings were instituted; that on November 2, 1917, nearly

eleven months after the money was procured by respondent, a new settlement was approved by the Industrial Board, by the terms of which respondent paid Soter \$250 in cash and gave him his note for a like amount, with his wife as co-maker, and deposited with the note, as collateral thereto, certain stock certificates. It appears that the old settlement was set aside and a new settlement was authorized for \$500, payable in this manner. It also appears that up to the time the commissioner's report was filed, no further payments had been made on said money, and that none of the balance of \$1103.30 has been returned to Rosenthal & Co. or the insurance company.

Numerous witnesses testified on behalf of the respondent as to his previous good character.

The respondent makes no denial of the proof of relator herein concerning what transpired except to that relating to the charges of conspiracy. Upon examination of the record pertaining to that matter, we are of the opinion that the finding of the commissioner that such a conspiracy was entered into for the purpose of absorbing the larger portion of the payment made in settlement of Soter's claim is justified by the evidence. Respondent was not acquainted with Soter or his friend, Rubenstein. The appearance of Soter and Rubenstein at the office of the respondent in company with Hoffman, and the early settlement of the Soter claim before the Industrial Board for a sum amounting to nearly three times the amount agreed upon in the settlement between Soter and the attorney for the insurance company, which order of settlement by the Industrial Board was made with the understanding and agreement of Hoffman, representing the insurance company, all tends to establish the existence of a conspiracy to collect a claim of a fraudulent amount from the insurance company, of which respondent and Hoffman were to receive the lion's share.

The commissioner recommends that owing to the previous good character of the respondent he be not disbarred

absolutely but that he be suspended until all of the money received by him should be re-paid to those having the right to receive it. The relator, however, excepts to this recommendation of the commissioner and urges that the rule be made absolute. While previous good character is a matter to be taken into consideration in a case of this kind, yet facts are here established showing a gross breach of the law and ethics of the profession, and previous good character should not be allowed to control the decision of this court concerning the matter. The duty rests upon this court and upon every member of the bar to see to it that public confidence in the integrity of those engaged in the profession shall not be forfeited. The relation of attorney and client is a fiduciary one. The public have a right to the maintenance on the part of the profession of a high standard of integrity among its members, and the duty rests upon this court to assist in the maintenance of that standard. The respondent here has been proven guilty not only of a serious breach of professional ethics but likewise a breach of the laws of the State. The evidence of his conspiracy in this case presents its gravest features, and shows respondent to be lacking in that integrity which the people have the right to demand of one engaged in the practice of the law.

The exceptions of the respondent to the report of the commissioner will be overruled. The exceptions of the relator to the recommendation of the commissioner will be sustained.

The rule will be made absolute and the name of the respondent stricken from the roll of attorneys.

Rule made absolute.

• (No. 12358.—Decree affirmed.)

ELIZABETH A. ROBERTS, Appellee, vs. GEORGE E. GOODIN,
Appellant.

Opinion filed June 18, 1919.

1. MORTGAGES—*when court is warranted in setting aside sale of property en masse.* A provision in a foreclosure decree that so much of the land shall be sold as is necessary to discharge the amount due is a clear direction to sell in parcels, and if the sale of the entire property is not necessary and it is susceptible of division the chancellor may set aside a sale of the property *en masse* and order a re-sale in separate tracts.

2. SAME—*wife is entitled to protection of court against foreclosure sale in fraud of her rights.* A wife who has a homestead right in property involved in a foreclosure proceeding is entitled to the protection of the court against any sale that will result in a fraud upon her marital rights.

3. SAME—*when a wife does not waive right to complain that property was not sold in separate tracts.* A wife who has a homestead interest in property involved in a foreclosure proceeding does not, by attending the sale and bidding on the property *en masse*, waive her right to complain that it was not sold in separate tracts, as directed by the decree of sale.

4. JUDICIAL SALES—*if possible, only such property will be sold as is necessary to discharge lien.* The statute relating to sales under foreclosure decrees as well as under executions, contemplates that only so much of the property involved shall be sold as is necessary to discharge the lien, where the property is susceptible of division.

5. SAME—*chancellor has discretion in approving master's sale subject to decree.* The chancellor has a broad discretion in the matter of approving a master's sale made subject to the court's approval by the terms of the decree of sale.

APPEAL from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

WILLIAM MUMFORD, and BARRY MUMFORD, for appellant.

W. E. WILLIAMS, and A. CLAY WILLIAMS, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal by George E. Goodin, purchaser at a master's sale under a decree of foreclosure, from an order and decree of the circuit court of Pike county vacating and setting aside said sale and ordering a re-sale of the lands described in the mortgage in separate tracts.

On July 20, 1910, Palmedus D. Roberts, his wife, Lucy Roberts, joining him, executed a certain mortgage on the farm on which they then resided, consisting of about one hundred acres, valued at about \$7000, to Strauss & Bro. to secure their certain note for the principal sum of \$4250, due in three years after date. Lucy Roberts, wife of the mortgagor, died soon thereafter, and in September, 1915, the mortgagor, Palmedus D. Roberts, married the appellee, Elizabeth A. Roberts. Payments on the note were made from time to time. At the time of the decree of foreclosure the accrued interest and principal amounted to \$2169.21. The mortgagor at the time of his marriage with appellee was seventy-two years of age and the appellee thirty-eight years of age. This marriage was opposed by the wife of the appellant, only daughter of the mortgagor. The evidence tends to prove that the appellant solicited Strauss & Bro. to file their bill for foreclosure.

The appellee filed her answer to the bill for foreclosure, averring that the property constituted the homestead of her husband, Palmedus D. Roberts, and herself; that she had a right of homestead in said premises and a right to redeem from any sale of the same, and that she had an inchoate right of dower in the land subject to the mortgage, and prayed that her rights in the premises be safeguarded and protected by any decree that might be rendered in said court and that her right of redemption be saved to her from any sale made under order of said court. Her husband made default. The cause was referred to the master in the usual way. The appellee concluded that she was not finan-

cially able to redeem the premises and obtained leave of court to withdraw her answer.

A decree was entered on the master's findings, ordering the sale of so much of said land as was necessary to discharge the debt and costs and which could be sold separately without material injury to the parties interested. On the sale the property was offered for sale *en masse*. The appellee bid the amount of the debt and costs and continued to bid against the appellant until the amount bid more than equaled her ability to pay. The property was not offered in separate tracts, as provided in the decree for sale. On the offer as a whole the appellant was the highest bidder and the property was declared sold to him for \$5025. The master thereupon issued his certificate of purchase to the appellant, paid the judgment and costs, including solicitor's fees, and the residue, amounting to \$2563.21, to the mortgagor, Palmedus D. Roberts, husband of appellee, over the protest of counsel for appellee, who served notice that objections would be filed on the convening of court the following Monday to the approval of the report of sale and that a motion to vacate the sale would be made. On the convening of court the appellee filed her verified written objections to the sale and to the master's report thereof and petitioned the court to vacate the sale and to order the land re-sold, in which she averred that the land was worth more than it sold for; that her husband was financially able to and could have paid the mortgage debt and prevented a foreclosure; that her husband had children by a former marriage who opposed this second marriage and who had never become reconciled to the marriage; that these children advised and persuaded her husband to default in payment of his interest charges and to bring about a foreclosure of the mortgage, so that appellee would be defrauded, cheated and deprived of her homestead and inchoate right of dower in the premises; that she and her husband reside on the forty acres of the land as a home-

stead; that in furtherance of a common design and plan to defraud appellee with respect to her rights and interest in the premises as the wife of the mortgagor, George Goodin, the son-in-law of the mortgagor, became the purchaser at this sale; that it is the purpose and aim of appellant, with the connivance and consent of her husband, to obtain a deed to the premises at the expiration of the period of redemption; that the appellee attended such sale, ready, willing and able to purchase and intending to bid the amount of the judgment and costs for all the land except the homestead forty, but was prevented from doing so by the master, who offered the land as a whole and not in separate tracts; that the property is capable of division and would have sold in separate tracts for a sufficient sum of money to have complied with the decree for sale without selling her homestead and should have been offered in separate tracts and not as a whole; that her highest bid was \$5000; that she was compelled to desist from further bidding because of her limited resources and means; that she has secured a loan on the balance of the land outside of the homestead sufficient to pay the debts and costs; that if the court vacates the sale and orders the property sold in separate tracts and the same is struck off to her, she will join with her husband in a mortgage on part or all of the land to secure the loan; that the excess of the selling price above the debt and costs has been or is about to be turned over to her husband; that if the master's report of sale is approved the appellee will be deprived and defrauded of her inchoate right of dower in the homestead by reason of her inability to redeem; that she made demand of the master to vacate the sale and order a re-sale, at which time the part of the premises not included in the homestead might be offered first, but that this request was ignored.

The purchaser, George E. Goodin, appellant, leave first being granted by the court, entered his appearance as party

defendant and moved the court to strike from the files the objections and exceptions of appellee, which motion was by the court denied. Thereupon appellant filed his written answer, under oath, to the objections, exceptions and petition of appellee, in which he admits the less material averments of the objections; denies the value of the land as fixed by appellee at \$125 per acre and avers its true value to be \$60 per acre; denies that it was possible for Roberts to avoid the foreclosure, and denies all and each of the other allegations in the petition of appellee.

After the taking of testimony on these issues so made up, the court sustained the objection and petition of appellee, refused to approve the master's report of sale, vacated and set aside the sale and all certificates and documents following and appertaining to the sale, and ordered a re-sale in separate tracts. Appellant excepted to this ruling and order and prayed and perfected an appeal to this court. The mortgagor and mortgagee abide the decree.

It is contended by the appellant that the appellee has no standing in court to make and prosecute the proceedings; that the motion to strike the objections should have been sustained; that appellee has waived her rights and is now estopped to make her objections to the sale.

The circuit court in setting aside the sale found that the property sold is susceptible of division and sale in separate tracts, that the property is of a value largely in excess of the judgment and costs against it, and that there was no necessity for the sale of the whole of the premises to satisfy the mortgage indebtedness. Upon examination of the testimony we are of the opinion that the chancellor was justified in the finding of these facts. The property was sold for more than twice the amount due against it. There also appears to have been no good reason for the master's selling the land *en masse* when the decree provided otherwise. The decree of sale provided that so much of the land should be sold as was necessary to discharge the amount

due against it. This was a clear direction to sell in parcels. The court is warranted in setting aside a sale where property sold *en masse* is susceptible of division and sold in separate tracts, and where the decree provides for the sale of only so much as is necessary, and where the sale of the entire property is not necessary.

The appellee is the wife of Palmedus D. Roberts and lives with him on the northeast quarter of the southwest quarter of the land described in the decree as a homestead. Upon the hearing the chancellor found that the remainder of the property, aside from that upon which the homestead is situated, is of sufficient value to satisfy the lien of the mortgage and should be first offered for sale separately from the homestead tract. We are of the opinion that this finding is also sustained by the evidence.

But it is objected that the appellee is but a volunteer, and that when she withdrew her answer she was no longer a party in interest. We cannot agree with this contention. Under section 3 of the Dower act appellee was entitled to dower out of the land in question as against every person except the mortgagee and those claiming under him. While this right of dower is inchoate and cannot be asserted in the lifetime of the husband, it is, however, such an interest as can be made the basis of a suit to set aside a deed executed in fraud of the marital rights of the wife. (*Higgins v. Higgins*, 219 Ill. 146; *Bigoness v. Hibbard*, 267 id. 301.) In addition it will be noted that the appellee has a homestead interest in the property subject to the mortgage. It follows that the appellee is not a volunteer in the sense of being one who has no interest in the property in question.

In the case of *Lurton v. Rodgers*, 139 Ill. 554, it was held that where property susceptible of division is sold *en masse* for an inadequate price without first offering the same in separate parcels the sale will be set aside within a reasonable time. It is the contemplation of the statute relating to sales under foreclosure decrees as well as under

executions, that only so much of the property affected by the lien shall be sold as is necessary to discharge the lien, where the property is susceptible of division. We are of the opinion that the chancellor was justified, under the facts of this case, in holding that the fifty-six acres not a part of the homestead should have been sold first.

The setting aside of the sale and ordering the property re-sold was a matter which rested largely within the discretion of the chancellor, whose duty it was to see that the lien be enforced with the least damage possible to the property rights of the mortgagor. Counsel cite numerous cases touching their contention that the chancellor erred in setting aside this sale. The cases cited, however, arose after the sale had once been confirmed, and not where, as here, the objection to the confirmation of the sale was filed immediately after the sale and before any confirmation had taken place. The chancellor has a broad discretion in the matter of approving or disapproving a master's sale made subject to the court's approval by the terms of the decree. (*Jennings v. Dunphy*, 174 Ill. 86.) Where it appears, as it does here, that the property may be sold in parcels, and where it appears that a portion of the property may be sold for a sufficient amount to cover the judgment and costs against the entire property, thereby leaving a homestead untouched, it is not an abuse of discretion on the part of the chancellor to set aside the sale and to order a re-sale of the property in separate tracts. The chancellor has the power to set the sale aside on his own motion in a case where such sale is made subject to the approval of the court. It is apparent from the evidence that the foreclosure and sale were brought about as a fraud upon the marital rights of the appellee. She has such an interest in the property as entitles her to the protection of the court against any sale which would result in fraud of her marital rights.

It is also contended that by attending the sale and bidding on the property *en masse* appellee waived her right

to complain that it was not sold in separate tracts. We do not think so. The decree of sale directed the master to sell in separate tracts. Appellee cannot, therefore, by bidding at the sale be held to have waived her right to have the master in chancery do that which the decree ordered.

The chancellor did not err in setting aside said sale and ordering a re-sale of the property in separate tracts.

The decree of the circuit court will be affirmed.

Decree affirmed.

(No. 12301.—Decree affirmed.)

ANDREW J. MCCARTNEY *et al.* Appellants, *vs.* HENRY E. JACOBS, Exr., *et al.* Appellees.

Opinion filed June 18, 1919.

1. *WILLS—when bequest for perpetual care of burial lots violates the rule against perpetuities.* A bequest of \$200 to an unincorporated cemetery association, to be held in trust and placed at interest for the perpetual care of a burial lot, violates the rule against perpetuities.

2. *SAME—when county court may control amount to be spent under bequest for markers for graves.* Where a testatrix authorizes her executor to purchase markers for the graves of herself and her brother, not to cost less than a certain sum, the county court has jurisdiction to control the amount of money to be expended for the markers above said sum.

3. *SAME—when valid trust is created for care of insane person.* A provision in a will that the real estate held in common by the testatrix and her insane brother, for whom she was conservator, shall be rented from year to year and the rents applied to the expense of keeping said brother in a certain sanitarium for the remainder of his life, creates a valid trust of the rents and profits from the interest of the testatrix in the land for the purpose of caring for the insane brother during his life.

4. *SAME—court is not authorized to make election for insane heir and devisee unless clearly for best interests.* Where a will directs the sale of a tract of land and the distribution of the proceeds among the heirs an insane heir is not capable of electing to take the land but any election on his behalf must be made by the court, and to authorize such election it must clearly appear to be for the best interests of the insane heir.

APPEAL from the Circuit Court of Marshall county; the Hon. CLYDE E. STONE, Judge, presiding.

ELMER J. SLOUGH, for appellants.

CLARENCE W. HEYL, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellants, heirs-at-law of Isabelle McCartney, filed their bill in the circuit court of Marshall county to construe her will.

Isabelle McCartney, who was never married, died testate February 8, 1917. She was sixty-eight years old at the time of her death, and left surviving as her only heirs five brothers, one of whom, George W. McCartney, was insane and had been for several years. He had been in the hospital for insane at Bartonville some time, but his sister, the testatrix, caused him to be removed from that place to the Lake Geneva Sanitarium, in Wisconsin. In addition to the property individually owned by the testatrix, she and her insane brother each owned the undivided one-half of 240 acres of farm land as tenants in common. At the time of her death she was conservator for her insane brother. The will is paragraphed into nine items. Item 1 simply directs the payment of the testatrix's debts and funeral expenses. The clauses of the will sought to be construed are items 2, 3 and 4. Item 2 directs the payment by the executor of \$200 to the United Presbyterian Cemetery Association, or the proper authority having charge and management of the United Presbyterian Cemetery in the town of LaPrairie, Marshall county, Illinois, to be held in trust and placed at interest perpetually, the interest only to be used each year for taking care of the John D. McCartney burial lot in said cemetery. Said item 2 further directs the executor to procure markers for the burial lots of testatrix and her brother George at a cost of not less than \$75 for

each marker. Item 3 directed that "the real estate held in common by myself and my said brother, George W. McCartney," (describing the 240 acres,) be rented from year to year and the rents received therefrom applied to the expense of keeping George in the Lake Geneva Sanitarium the remainder of his life. Said item further directed that testatrix's said brother should be kept at said sanitarium and should not be sent to or placed in any other institution; that after paying out of the rents of the 240 acres the maintenance of George, if there was any remainder it should be applied to the payment of taxes and the general up-keep and improvement of the land. In case the rents were insufficient to pay the expense of keeping and maintaining the insane brother, then the will directed that additional funds necessary be procured by loan "upon any of the real estate aforesaid," and if any conservator was appointed to succeed testatrix, she expressed the wish that said conservator be authorized by the court to procure a loan on the interest of George to make up any deficiency. If that could not be done, then the will directed that the trustee thereafter named should borrow what was necessary on the interest of the testatrix in the 240 acres of land, and Henry E. Jacobs was in the same clause named as trustee for the purpose of looking after and caring for George, and to "conserve the rentals aforesaid so far as my interest or control therein may appertain, and to apply the rents for the maintenance of my brother George W. McCartney, pay the taxes and improvements, if need be, secure the amount for any deficiency of fund necessary to meet those items by loan against my interest in the real estate in this item of this my will above described." Item 4 directed the executor to sell, within one year after testatrix's death, a 40-acre tract of land described, which was her sole property. Preference was given testatrix's brother Andrew to buy said land within six months, if he desired, for the price of \$200 per acre. In case he should not buy it within that period

the executor was directed to sell it at private sale for the best price obtainable. The money derived from the sale, after the debts and funeral expenses and bequests were paid, was directed to be distributed equally among the heirs of testatrix. The executor was given full power and authority to execute necessary deed to convey to the purchaser title in fee simple. Andrew J. McCartney did not exercise his option to buy the land and the executor sold it for \$210 per acre.

The bill charges that the \$200 bequest in item 2 to the cemetery association, which was unincorporated, in trust, the interest to be used in taking care of the burial lot of John D. McCartney, who was the father of testatrix, was in violation of the rule against perpetuities; that the provision in said item for markers for the graves of testatrix and her brother George, at a cost of not less than \$75 each, is uncertain and indefinite and leaves it to the discretion or whim of the executor to unnecessarily spend and dissipate the money of the estate; also it is alleged said provision is void because it is uncertain, now or in the future, about where George will be buried, as he owns no lot in the cemetery mentioned and the testatrix did not have legal power or authority to designate where he shall be buried. The objections alleged in the bill to item 3 are that it is indefinite and uncertain, in that it cannot be known whether George, in order to receive the maintenance provided, shall be required to stay at the Lake Geneva Sanitarium the remainder of his life, or whether, if removed to some other institution, the maintenance will be forfeited, and whether, if a loan is made, it shall be upon the whole of said lands or upon the undivided interest of George. The bill makes inquiry whether item 3 creates a valid trust in the property, and whether, if it does, it is a trust in the life estate, only, of George, and the interest of the testatrix in fee if necessary for the maintenance of George, and whether said item is null and void because of uncertainties and insufficiencies.

The bill alleges under item 4 it is uncertain whether the complainants, as heirs or devisees of the testatrix, have the right, if all concur, to take, subject to debts and charges, the 40 acres of land directed to be sold and the proceeds divided or whether the land must be sold, and whether the executor, without a specific devise to him of the title, has power to convey the land in fee simple or whether the power of sale is void and the title descended to the heirs under the laws of descent.

Henry E. Jacobs, in his capacity both as trustee and executor, the United Presbyterian Cemetery Association of the town of LaPrairie, and the individual members of said association, were made defendants to the bill. After answer and replication were filed the cause was referred to the master in chancery to take the proofs and report his conclusion. Before the master had completed taking testimony and made his report defendants filed an amended answer, and Henry E. Jacobs, as executor and testamentary trustee, filed a cross-bill praying that he be appointed trustee as provided in and by the will of Isabelle McCartney. Defendants to the cross-bill and the guardian *ad litem* for George W. McCartney, insane defendant, answered, and the cause was re-referred to the master. The master reported, recommending a decree denying the relief prayed by complainants in their original bill except as to the \$200 bequeathed to the cemetery association and the provision for markers for the graves of testatrix and her brother George in item 2, which he recommended be decreed to be null and void. The court entered a decree in accordance with the report and recommendation of the master, except the court decreed the provision for markers for the graves of testatrix and her brother George was valid, that the county court had jurisdiction and authority to control the amount expended for the markers, and that said provision was not subject to the objection alleged in the bill. The only relief granted complainants by the decree was the holding that

the bequest of \$200 to the cemetery association was void. The court decreed that by item 3 it was intended to create a trust of the rents and profits from the interest of testatrix in the land described for the purpose of caring for her insane brother and that a trustee should be appointed to carry out that provision of the will, and Henry E. Jacobs was appointed such trustee and required to give bond in the sum of \$5000.

Defendants have assigned cross-errors on the part of the decree holding the bequest to the cemetery association void. Bequests to similar associations for the perpetual care of burial lots were held to violate the rule against perpetuities, and to be therefore void, in *Mason v. Bloomington Library Ass'n*, 237 Ill. 442, and *Burke v. Burke*, 259 id. 262. The association was never incorporated and therefore was incapable of taking under the act of 1911. (Hurd's Stat. 1917, chap. 21, par. 31.)

The objections to the bequest for markers for the graves of testatrix and her brother George, to cost not less than \$75 each, are that it is uncertain and indefinite, and it is left to the uncontrolled power of the executor to dissipate the money and funds of the estate in providing the markers. The circuit court correctly held that the county court had jurisdiction and power to control the amount of money expended for the markers.

As to item 3 the court properly decreed that it was the intention of the testatrix to, and said item did, create a valid trust of the rents and profits of the interest of the testatrix in the 240 acres of land for the purpose of caring for the insane brother during his life, and a trustee was properly appointed to carry out said provision.

As to the fourth item, which directs the sale by the executor of a 40-acre tract of land and the distribution of the proceeds among the heirs, the objection is that it is uncertain whether, if all the heirs and devisees concurred, they could elect to take the land subject to the charges and in-

debtedness. Whether they could have elected to take the land or not, they never attempted to make any such election. By their bill they did not offer to elect but merely asked the court whether they had such right. If the court had decreed they had such right it would have been optional with them whether or not they would exercise it. Furthermore, the insane heir and devisee was not capable of electing. Any election on his behalf would have been required to have been made by the court. No prayer of that kind was contained in the bill, and if there had been it seems quite clear the court would not have been warranted in electing for the insane heir to take the land. To authorize such election it must clearly appear to be for the best interests of the insane heir. *Gorman v. Mullins*, 172 Ill. 349.

The wishes and intentions of the testatrix are expressed in her will in language easily understood, and, except the bequest to the cemetery association, none of its provisions are contrary to any rule of law or against public policy.

The decree of the circuit court is affirmed.

Decree affirmed.

Mr. JUSTICE STONE took no part in this case.

(No. 12269.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. WALTER SPERLING, Plaintiff in Error.

Opinion filed June 18, 1919.

APPEALS AND ERRORS—*effect where bill of exceptions is stricken from files.* Where the bill of exceptions is stricken from the files in the Supreme Court and all the assignments of error rest upon evidence contained therein and not solely upon the common law record, no question is presented for the consideration of the Supreme Court and the judgment will be affirmed.

WRIT OF ERROR to the Circuit Court of McDonough county; the Hon. HARRY M. WAGGONER, Judge, presiding.

HARDIN W. MASTERS, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, ANDREW L. HAINLINE, State's Attorney, ALBERT D. RODENBERG, and JAMES W. GULLETT, for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error was indicted in January, 1918, in the circuit court of McDonough county for forgery, and after trial before a jury was convicted and sentenced. This writ of error has been sued out to review the proceedings of the trial court.

Plaintiff in error makes ten assignments, alleging errors for which the judgment should be reversed. These errors all rest upon evidence contained in the bill of exceptions filed in the cause. This court at the April term, 1919, allowed a motion of defendant in error to strike the purported bill of exceptions from the files. Counsel for plaintiff in error relies particularly upon assignments first and third. The first assignment of error is that the court erred in overruling plaintiff in error's motion for change of venue, and the third is that evidence was erroneously admitted with reference to the charter of a certain bank. As the bill of exceptions has been stricken from the files there is nothing before us upon which to base a decision as to these two assignments of error. (*People v. Weston*, 236 Ill. 104; *Macierz Polska v. Czarnecki*, 272 id. 34; *People v. Tielke*, 259 id. 88.) There is no error urged that rests solely upon the common law record. It follows that the record presents no question for our consideration.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(No. 12391.—Decree affirmed.)

W. D. SHELDON *et al.* Appellants, *vs.* THE ROCKFORD AND INTERURBAN RAILWAY COMPANY, Appellee.

Opinion filed June 18, 1919.

1. PLATS—*when deed of vacation may be executed.* Under section 7 of the Plats act a deed of vacation may be executed by the owner of the territory within the part of the plat sought to be vacated if the vacation does not violate the rights of other proprietors in the plat and does not close or obstruct any public highway laid out according to law.

2. SAME—*when deed of vacation does not obstruct public highways.* The maker of a plat cannot compel the municipality to accept the streets and assume the burden of maintaining them, and unless something is done by the public authorities to indicate an acceptance of the streets and alleys platted, a deed of vacation which includes the streets and alleys indicated on the plat does not close or obstruct public highways "laid out according to law."

APPEAL from the Circuit Court of Winnebago county; the Hon. OSCAR E. HEARD, Judge, presiding.

DAVID D. MADDEN, for appellants.

FISHER, NORTH, WELSH & LINSOTT, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Winnebago county sustaining a demurrer to and dismissing a bill in chancery filed by appellants, praying that appellee be required to remove fences and other obstructions from certain streets and alleys in Harlem Park subdivision to the city of Rockford.

The litigation involves the validity of a deed of vacation to part of the plat of Harlem Park subdivision. The land, before it was platted into lots, blocks, streets and alleys, was purchased by W. H. McCutchan, who gave a mortgage on the tract to secure part of the purchase money. The mortgage provided that in case the tract of land was

platted into lots and blocks and the mortgagor should sell some of the lots, the mortgagee would release the lots so sold from the lien of the mortgage. In August, 1890, McCutchan and wife platted the tract of land into blocks, lots, streets and alleys, which plat was duly acknowledged and recorded. The tract of land abutted the west bank of Rock river at a place where, as shown by the plat in the record, there is a considerable bend in the river to the east, and blocks 1, 14 and 15 lay farthest east in the bend and next to the river. Strips are shown on the plat of the subdivision running east and west between blocks, as avenue "A," "B," "C" and "D" and Brown avenue. The plat shows these streets, as well as streets both north and south of them, extend east to the river or to Harlem boulevard, which is next to the river bank and runs in a general north and south direction parallel with the river. Blocks 1, 14 and 15 abut west on Belmont street, as shown by the plat. Avenue "C" runs east and west between blocks 14 and 15 and avenue "D" east and west between blocks 1 and 14. Avenue "B" runs east and west along the south end of block 15 and Brown avenue along the north end of block 1, and all the avenues terminate on the east at the river or Harlem boulevard above mentioned. The mortgage given on the tract before its subdivision by McCutchan and wife was foreclosed, except as to lots which had been previously sold. They were not affected by the foreclosure decree. No lots in blocks 1, 14 and 15 had been sold prior to the foreclosure, and at the sale under the foreclosure decree the defendant, the Rockford and Interurban Railway Company, purchased all three of said blocks and subsequently acquired a deed for them. May 9, 1910, defendant filed a vacation deed vacating all that part of the subdivision designated on the plat lying east of the east line of Belmont street, including the portions of avenues "B," "C," "D" and Brown avenue and alleyways east of Belmont street. Complainants each own one or more lots lying west of Belmont

street, which street is not affected by the vacation. Seven of the lots front on the west side of that street. Three of them lie a block further west, and one of them is four blocks west of Belmont street. The deed vacates the ends of all streets and alleys east of Belmont street from Brown avenue on the north to avenue "B" on the south, which would prevent complainants' access to the river by means of these avenues. The territory vacated is only one block wide and three blocks long from north to south, and, as before stated, it lies next to the river, which would still be accessible to complainants either north or south of the vacated territory, but most of them would be required to travel a little farther for that purpose. Defendant was the sole owner of all the lots and blocks sought to be vacated.

Section 6 of chapter 109 of Hurd's Statutes prescribes when, by whom and how an entire plat may be vacated. Section 7 authorizes the vacation of part of a plat by the owner in manner prescribed in section 6, provided the vacation does not abridge or destroy the rights or privileges of other proprietors in such plat, and it is further provided that nothing in said section shall authorize closing or obstructing any public highway laid out according to law. Defendant being the owner of the territory within the part of the plat sought to be vacated, had authority to execute the deed of vacation if it did not violate the rights of other proprietors in the plat, and the vacation did not close or obstruct any public highway laid out according to law. The statute governing this subject has been considered by this court a number of times. (*Littler v. City of Lincoln*, 106 Ill. 353; *Heppes Co. v. City of Chicago*, 260 id. 506; *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 138 id. 628; *Consumers Co. v. City of Chicago*, 268 id. 113; *Illinois Western Electric Co. v. Town of Cicero*, 282 id. 468.) These decisions render unnecessary and inappropriate further discussion of the construction and meaning of the statute.

Complainants contend their rights as proprietors of lots in the subdivision are violated by vacation of part of the plat; also that the vacation deed purports to vacate streets and alleys, and was illegal for the reason the streets and alleys belonged to the municipality and no action had been taken by the public authorities to vacate them. Complainants are not deprived of ingress to and egress from their lots by the vacation of the stub ends of the streets east of Belmont street. Their access to the river is only affected to the extent that instead of passing east through the vacated premises they are required to travel a little farther and reach the river north or south of the vacated territory. It is not claimed there is any bridge across the river reached by any of the vacated streets or that the land on the other side of the river has ever been platted. "The rights or privileges of other proprietors in the plat which the statute protects are necessarily legal rights and privileges, and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property nor directly affording access thereto and egress therefrom." *Little v. City of Lincoln, supra.*

It is not alleged in the bill or claimed in argument that the streets and alleys vacated were ever improved by the public authorities or that they had done anything to indicate acceptance of them as streets and alleys. The owner could not compel the municipality to accept the streets and assume the burden of maintaining them, but, as a matter of law, there must be an acceptance before the fee will pass to the city. (*Heppes Co. v. City of Chicago, supra.*) The streets and alleys vacated by the deed were not public highways laid out according to law. (*Chicago Anderson Pressed Brick Co. v. City of Chicago, supra.*) A fair and reasonable construction of the deed includes not only the streets and alleys, but all the property belonging to defendant in that part of the plat vacated.

The decree of the circuit court is affirmed.

Decree affirmed.

(No. 12712.—Reversed and remanded.)

THE SCHILLER PIANO COMPANY, Appellant, vs. THE ILLINOIS NORTHERN UTILITIES COMPANY, Appellee.

Opinion filed June 18, 1919.

1. POLICE POWER—*property rights are subject to the exercise of police power.* All property in the State is held subject to the police power to so regulate its use in a proper case as to secure the safety, health, morals, good order and general welfare of the community.

2. SAME—*exercise of police power must be necessary and reasonable.* Statutes in the exercise of the police power are sustained on the theory that they are necessary for the safety, health, morals or welfare of the public, and an unreasonable invasion of private rights or impairment of the rights of property guaranteed by the constitution, under the guise of the police power, will not be sustained.

3. SAME—*contract rights are subject to the exercise of police power.* The constitutional prohibition upon a State to pass any law impairing the obligation of contracts does not limit the right of the State to pass laws for the protection of the public health, safety or morals, and rights and privileges arising from contracts are subject to such regulations.

4. SAME—*what is measure of reasonableness of police regulation.* The measure of reasonableness of a police regulation is not necessarily what is best but what is fairly appropriate under all the circumstances.

5. SAME—*what conduct is not subject to police power.* Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation and promotion of the public health, safety, morals or welfare, and conduct which has no tendency to affect or endanger the public in any of those particulars and which is entirely innocent in character is not subject to the police power.

6. SAME—*extent to which business of a public utility may be regulated under police power.* Under the police power the State has authority to enact legislation to regulate the charges and business of a public utility corporation, but if such legislation operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement on personal or property rights it will be held void, as in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law.

7. PUBLIC UTILITIES—*purpose of Public Utilities act.* The Public Utilities act has no relation to the health, safety or morals of the public, but the object of the statute is to regulate public service corporations in the interest of the public welfare, and it is not intended to destroy property where such destruction is not necessary to accomplish the objects and benefits of the legislation.

8. SAME—*when Public Utilities act does not abrogate existing contract.* Where a power company, before the passage of the Public Utilities act, has contracted to furnish electric power to a manufacturing plant at a certain rate in consideration of a conveyance of the latter's water power rights in a dam, the performance of the contract will not be enjoined as being a discrimination in rates prohibited by such statute, as the contract may be performed without public injury and is not abrogated by the passage of the act.

APPEAL from the Circuit Court of Ogle county; the Hon. OSCAR E. HEARD, Judge, presiding.

J. C. SEYSTER, for appellant.

FRANC BACON, and RALPH D. STEVENSON, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This appeal is prosecuted by the Schiller Piano Company from a decree of the circuit court of Ogle county denying the relief prayed in a bill filed by the Schiller Piano Company against the Illinois Northern Utilities Company and dismissing the bill for want of equity.

The bill alleged, in substance, that appellant is, and has been for more than twenty years, engaged in the manufacture of pianos at Oregon, Illinois, at the west end of a dam there located across Rock river for the purpose of furnishing power for carrying on various manufacturing enterprises. The dam was alleged to be 924 feet long and of sufficient height to create power estimated equal to 1000 horse power. December 28, 1910, appellant owned 117 horse power created by said dam, and on that day it entered into a contract with the Oregon Power Company whereby appellant sold and transferred its 117 horse power

created by the dam to the Oregon Power Company in consideration of the agreement of that company to furnish the appellant perpetually thereafter, at its factory, with 90 kilowatts of electrical power free of charge, and all power furnished appellant in excess of 90 kilowatts should be paid for. The Oregon Power Company agreed to pay appellant \$25 per day for each day it failed to furnish the power as agreed. The contract was performed until May 2, 1912, when a new contract between the parties was made, by which the Oregon Power Company was released from its obligations created by the former contract, and by the new contract the Oregon Power Company, for itself, its successors and assigns, agreed to continuously supply appellant with 72.4 kilowatts of electrical power or energy free of charge unless prevented by act of God or inevitable accident. The contract of May 2, 1912, it is said, was made in lieu of the contract of December 28, 1910, because, while it is undisputed that 117 horse power owned by appellant would create 90 kilowatts of electrical energy, there would be such loss in transmitting it to appellant as would reduce it to 72.4 kilowatts. At the time the contract of May 2 was made, the Oregon Power Company owned a steam plant at the west end of the dam, to be used to supply power when the dam for any reason failed to do so. Shortly after the date of the second contract the Oregon Power Company sold and transferred its rights and properties in the dam to the Illinois Northern Utilities Company, appellee, which assumed the obligations of the Oregon Power Company and furnished appellant power according to the contract until October 25, 1913, when it notified appellant in writing that the dam having been taken out by high water it would discontinue furnishing appellant power after November 1, following. The bill alleges a break had occurred in the dam which could have been easily repaired, but appellee neglected and refused to repair it. The bill was filed October 31, alleging all the facts and the injury appellant would

suffer if appellee did not furnish it power, and praying appellee be enjoined from turning off or discontinuing the power to appellant's plant under the contract and that said contract be enforced. A temporary writ of injunction was issued.

Appellee answered the bill and denied appellant was entitled to the relief prayed. The case was referred to the master in chancery to take and report the proofs, together with his findings thereon. The appellant having closed its proofs, at the January term, 1917, a rule was entered against appellee to close its proofs by the first day of the next term of the court. The record does not show the rule was complied with, but on October 9, 1918, appellee filed its cross-bill, alleging it was a corporation organized under the laws of Illinois; that it owned and operated for public use, property for the production, transmission, sale and delivery of electric light, heat and power in the vicinity of Oregon and other parts of Illinois; that from the time the cross-complainant acquired the property of the Oregon Power Company to October 31 it had voluntarily supplied appellant with power, and that since that time it had furnished power under compulsion of the injunction granted by the circuit court. The cross-bill alleged that January 1, 1914, the Public Utilities act went into effect; that appellee is a public utility, and the act provides that charges for service made by a public utility shall be reasonable and just and all unjust and unreasonable charges shall be unlawful; that the act requires a public utility company to file with the State Public Utilities Commission a schedule of its rates and charges, and prohibits charging or receiving any different rate than that provided in the schedule of rates. The substance of some of the provisions of the Public Utilities act are set out, and the cross-bill avers that by virtue of said act the contract to furnish appellant power became unlawful and it became and is unlawful for appellee to supply appellant with power free of charge. The cross-bill prays

that the temporary injunction be dissolved and appellant's bill dismissed.

Appellant answered the cross-bill, denying appellee had furnished it power free of charge and averring that it had paid for its power by the consideration expressed in the contract. The answer further denied the performance of the contract was rendered unlawful by the Public Utilities act, and denied appellee was entitled to the relief prayed in the cross-bill. The motion to dissolve the injunction was heard on the pleadings and affidavits in support of and in opposition to the motion, and a decree entered dissolving the injunction and dismissing the original bill.

Three questions involved are (1) whether the Public Utilities act made the contract unlawful, and to compel its performance by continuing the injunction in force would be requiring appellee to violate the law; (2) whether the original contract was invalid at common law, in that it unfairly discriminated in favor of appellant; (3) whether appellant's bill alleged facts entitling it to the writ of injunction.

All property in a State is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others and subject to such reasonable regulations as the legislature may impose upon its use in order to protect the public and others in the use of their property. It is held subject to the police power of the State to so regulate its use in a proper case as to secure the safety, health, morals, good order and general welfare of the community. There are limitations, however, to the police power, and an unreasonable invasion of private rights or impairment of the rights of property guaranteed by the constitution, under the guise of the police power, will not be sustained. The constitutional prohibition upon a State to pass any law impairing the obligation of contracts does not limit the right of or prohibit the State from passing laws for the protection of the public health, safety or mor-

als, and rights and privileges arising from contracts are subject to such regulations. Instances of these principles frequently cited are, that when entered into a contract to sell liquor, operate a brewery or distillery or conduct a lottery may be lawful, but such contracts are subject to impairment by a change of policy on the part of the State. That such change of policy by the State may prevent the enjoyment of individual rights in property without providing compensation therefor does not necessarily render such legislation unconstitutional, but such legislation must, to be within the police power, be reasonable in its operation on persons affected by it and not unduly oppressive. Such statutes are sustained on the theory that they are necessary for the safety, health, morals or welfare of the public, and a restriction or regulation without reason or necessity cannot be enforced. The measure of reasonableness of a police regulation is not necessarily what is best, but what is fairly appropriate under all the circumstances. Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation and promotion of the public health, safety, morals or welfare. . An act which has no tendency to affect or endanger the public in any of those particulars and which is entirely innocent in character is not within the police power. These general principles are universally recognized and will be found discussed and numerous authorities referred to in 6 R. C. L. 193, *et seq.* Under the police power the State has authority to enact legislation to regulate the charges and business of a public utility corporation, but if such legislation operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement on personal or property rights it will be held void, as in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law. The Public Utilities act of this State has no relation to the public health, safety or

morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare.

When the contract between the Oregon Power Company and appellant was made it was a valid and lawful agreement, not contrary to the common law or any statute. Contracts void at common law are contracts against public policy because injurious to the public welfare. This was not such a contract. Appellant by the contract sold and transferred to the Oregon Power Company the 117 horse power of which it was then the owner, in consideration of the agreement of the Oregon Power Company that it, its successors and assigns, would furnish appellant the power agreed upon. The contract was performed by that company until it sold the dam and all its rights therein to appellee, the Illinois Northern Utilities Company, and that company continued to furnish the power under the contract until October 25, 1913, when it notified appellant that because the dam, or part of it, had been washed out it would discontinue supplying power November 1, following. In October, 1918, appellee's cross-bill was filed, alleging the passage and approval of the Public Utilities act; that it became effective January 1, 1914, and that said act made it unlawful for appellee to perform the contract. It must be assumed that what appellee's predecessor acquired from appellant under the contract was worth the consideration agreed to be paid. Appellee purchased the property with knowledge of the contract and the consideration for it. It acquired the property and rights of appellant and became obligated to pay the consideration therefor. It now seeks to avoid that obligation on the ground that the Public Utilities statute was enacted by the legislature in the exercise of the police power and that said act renders the performance of the contract unlawful.

That the Public Utilities statute was a valid exercise of the police power for the purposes for which it was enacted

must be conceded, but it does not necessarily follow that it operated to render the performance of this contract unlawful. The object of the statute was to regulate public service corporations in the interest of the public welfare. Any contract to furnish service in violation of that act would be unlawful, but the situation here presented is not a contract to furnish appellant power at a less rate than the approved schedule of charges. It may be conceded that if appellant, owning no interest in the dam, had before the passage of the Public Utilities act entered into a contract with appellee to purchase power at a certain rate or charge per annum and the rate fixed was lower than the authorized schedule, the performance of the contract would have been unlawful after the act went into effect. Here, however, appellant conveyed and transferred its property as the consideration for the power, and the effect of holding the performance of the agreement was made unlawful by the legislation referred to, takes from appellant its property without compensation and without due process of law. The right of appellant under the contract was property. The right of property is a fundamental right and its protection is one of the most important objects of government. There is nothing in the contract and its performance which is detrimental to the public interest and welfare, for the protection and promotion of which the Public Utilities act was adopted. It jars unpleasantly on one's sense of justice to say the effect of the statute was to destroy or confiscate appellant's property for the benefit and advantage of appellee. We are aware courts have gone to considerable length in holding that legislation enacted in the proper and reasonable exercise of the police power will not be held invalid because it may impair the obligation of contracts or deprive the owner of property without due process of law, but the qualification that such legislation must be proper and reasonable for the purpose sought to be accomplished is an important one. True, private rights must yield to consid-

eration of the public safety, health, morals and welfare, and no investment in property, however large, will preclude the exercise of the governmental power of regulation when reasonably necessary for these purposes, but our attention has not been called to any case where the exercise of such power has been sustained when not necessary for these objects. None of the subjects which are the valid basis for the exercise of the police power were involved in the contract. It could in no way affect the public health or safety, was not contrary to good morals or the public interest and welfare. If the protection of one or more of these things is necessary to a valid exercise of the police power, how can it be said the performance of the contract was made unlawful by the statute? It seems to us it would be pushing the valid exercise of the police power to unreasonable limits to so hold. It must be admitted the situation here is unusual and could not have been contemplated by the legislature. That body, in enacting the Public Utilities statute, sought only to regulate public service companies. It did not intend to destroy property where such destruction was wholly unnecessary to accomplish the objects and benefits of the legislation. Full effect may be given the statute for the purposes for which it was enacted and the contract performed at the same time without injury of any character to the public. On the contrary, it would offend against good morals and common honesty, now that appellant has conveyed its property to appellee, to give the statute the effect of having relieved appellee of the obligation to pay for it. We would only be justified in so construing the statute if such construction were reasonably necessary for the protection of the public. This we have endeavored to show is neither involved nor necessary in sustaining this contract. The contract did not provide for furnishing free service. The equivalent in value for the service agreed to be furnished was paid by appellant by the conveyance of its property. We have not overlooked *Hite v. Cincinnati*,

Indianapolis and Western Railroad Co. 284 Ill. 297, *Louisville and Nashville Railroad Co. v. Mottley*, 219 U. S. 467, and other cases relied on by appellee, some of which we think distinguishable and others not controlling.

The decree of the circuit court is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(No. 12192.—Reversed and remanded.)

J. HACKEN vs. HARRIS ISENBERG *et al.* Appellees.—(CHRISTINA ROLLBERG, Appellant.)

Opinion filed June 18, 1919—Rehearing denied October 8, 1919.

1. **MECHANICS' LIENS**—*meaning of words "the owner," in section 30 of Mechanic's Lien act.* The words "the owner," in section 30 of the Mechanic's Lien act, giving a right to file a bill for general settlement, have the same meaning as they do in section 1 of the act, and have reference to anyone having an estate, right or interest in property, either in fee, for life or for years, or any other interest against which a lien is sought to be enforced.

2. **SAME**—*who must be made parties to a bill for general settlement.* A party filing a bill for a general settlement under section 30 of the Mechanic's Lien act must make parties to his bill all persons claiming liens against the premises and all persons interested in the premises, including other owners, if any, whose interests may be subject to such liens or affected thereby.

3. **SAME**—*who may file intervening petition or cross-bill to bill for general settlement.* Any of the parties claiming liens and made parties to a bill for a general settlement under section 30 of the Mechanic's Lien act may file an intervening petition or an answer in the nature thereof, or a cross-bill, and may make parties defendant thereto any owners who were not made parties to the original bill, for the purpose of determining whether the interests of such owners are subject to said liens.

4. **SAME**—*burden is on lienors to establish right to lien.* The burden is upon the lienors to prove every fact required by the Mechanic's Lien act to establish their right to a lien on the premises, either against the interest of the lessee or against the interest of the owner of the fee.

5. *SAME—when owner submits to jurisdiction of court.* Where a bill is filed by a lessee for a general settlement under section 30 of the Mechanic's Lien act and the court has properly permitted parties claiming liens to file intervening petitions and a cross-bill, a party who is made a defendant to the petitions and cross-bill as an interested owner, and who was not a party to the original bill, submits to the jurisdiction of the court by filing pleas and answers to the petitions and cross-bill, and permission of the court to make said owner a defendant is given by trying the issues and entering the decree.

6. *SAME—when liens are not barred by Statute of Limitations.* Where a new party is introduced into a suit by amendment, the suit is brought, as to such party, from the date of the amendment; but where the owner of premises is not brought into a suit by the lessee, under section 30 of the Mechanic's Lien act, until she has been made a defendant to intervening petitions and a cross-bill by parties claiming liens, the liens are not barred by the Statute of Limitations though said owner did not answer the petitions or cross-bill until after the period of limitation had expired.

7. *SAME—meaning of word "repair" when used in lease.* In a provision in a lease that the lessee shall keep the premises in good repair, the word "repair" is used in its ordinary sense and means restoration after decay, injury or partial destruction, and does not include alterations or additions that the lessee may choose to make.

8. *SAME—interest of lessor in building cannot be subjected to lien for unauthorized alterations by lessee.* The interest of the lessor and owner of premises cannot be subjected to a mechanic's lien for the subsequent making by the lessee of alterations and additions to the building thereon, in the absence of any showing that the lessor authorized or consented to the same, where the lease expressly requires consent in writing by the lessor to the making of alterations or additions.

9. *SAME—object of sections 89 and 90 of Torrens act, requiring filing of notice of lien.* Sections 89 and 90 of the Torrens law, requiring the filing of a claim for a mechanic's lien in the registrar's office, were not intended to enable any record owner to defeat a lien given by the Lien act, but were enacted in the interest of parties who might become purchasers or otherwise interested in the lands of the owner of the registered title after mechanics' liens had attached.

10. *SAME—rule as to filing claim for mechanic's lien where Torrens law is in force.* In counties where the Torrens system of registering titles is in force, a claim for a mechanic's lien, as against subsequent purchasers and creditors, must be filed within the four

months' period provided for in the Mechanic's Lien law, in the office of the registrar of titles, and a memorial of the claim be entered in the register of titles, but as against the owner of the premises the claim may be filed at any time within two years after the completion of the contract.

11. SAME—*provisions of the Mechanic's Lien act of 1895, re-enacted in 1903, have remained in force.* While the Mechanic's Lien act of 1903 repealed the act of 1895, all provisions of the act of 1895 that were re-enacted in the act of 1903 are to be construed as remaining in force and not as being a new enactment.

12. REGISTRATION OF TITLE—*object of Torrens system of registration.* The object of the Torrens system is to create an independent system of registration of land titles by requiring that all instruments intended for the purpose of passing or affecting any title to real estate shall be filed and registered in that department and no other, in order that subsequent purchasers or parties dealing with the title may have notice of the interest registered.

13. STATUTES—*former act will not be repealed by later statute on same subject if both acts can be given effect.* Two acts covering the same subject should be construed, if possible, so that each shall have due effect, and in such case the later act, or the act varying in some minor degree the requirements necessary to obtain the relief given by the statute, instead of being construed to repeal the former or other act should be held to be an amendment or modification.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

MACLAY HOYNE, State's Attorney, CULVER, ANDREWS, KING & STITT, JOHN W. BECKWITH, and CHARLES T. FARSON, for appellant.

HYMAN SOBOROFF, for appellees.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

On July 10, 1912, Joseph Hacken entered into a lease in writing with Henry A. Rollberg for a two-story frame building known as No. 1141 South Halsted street, Chicago,

for a period of ten years from the first day of September, 1912. The property was owned at that time by Henry A. Rollberg and Christina Rollberg, his wife, as joint tenants. Hacken entered into a contract in writing August 14, 1912, with Harris Isenberg, Benjamin Isenberg and Morris Kaplan, contractors of the city of Chicago, for the remodeling of said building according to certain plans, specifications and drawings made by R. D. Brown, architect and superintendent, the alterations to cost \$4025. The contractors let portions of the work to different sub-contractors, who furnished work and material for the premises. Hacken paid to the original contractors on the work of remodeling \$1600. A number of sub-contractors and material-men served notices of liens on the Rollbergs and were threatening suit. On January 3, 1913, Hacken filed in the circuit court of Cook county, under section 30 of the Mechanic's Lien law, a bill for a general settlement and to bring all of the lienors into court to have their claims adjusted in one suit and to enjoin and restrain them from prosecuting separate suits. The Rollbergs were not made parties to this bill. A number of sub-contractors and the original contractors were made parties defendant to the bill. On March 22, 1913, leave was given to the sub-contractors, some of whom were not made defendants to the original bill, to file answers in the nature of intervening petitions. The Rollbergs were made parties defendant to these intervening petitions. Thereafter the original contractors filed an answer in the nature of an intervening petition, and in May, 1914, a cross-bill, and joined the Rollbergs as parties defendant. No summons was issued to the Rollbergs except on the intervening petition of J. A. Thomas, a sub-contractor whose claim was afterwards disallowed by the court. The Rollbergs filed their appearance March 5, 1914, and on April 2, 1914, they filed their joint plea to all petitions and claims, setting up as a defense that no notice or claim for lien was filed with the recorder by any of the parties claiming liens,

as required by the provisions of the Torrens act; that their property was registered under the Torrens act, and by reason thereof no such liens could be maintained by the sub-contractors. A reference to a master in chancery was taken on the issues formed, under a stipulation that the Rollbergs should have accorded to them all their rights and defenses to the same extent as if they had been pleaded by proper answers filed. After the testimony was taken Henry A. Rollberg died. His death was suggested on the record, and the suit proceeded against Christina Rollberg in her own right and as successor to the title of her deceased husband. She then filed answers to all intervening petitions, including the cross-bill of the contractors, setting up all her defenses. The court held and decreed that the contractors were entitled to a lien on the premises, including her interest therein, for \$2425 and \$500 interest, and that the sub-contractors, M. Schulrey, H. Kapper, the I. Lurya Lumber Company and Sam Kaplin, were also entitled to liens in equal degree, aggregating \$1266.71, and further that the claim of the original contractors should be decreased to the extent of any and all payments that might be made on the amounts decreed to the sub-contractors, and that said premises be sold to pay said liens and costs unless paid by Hacken or Mrs. Rollberg. On appeal to the Appellate Court for the First District the decree was affirmed. She has prosecuted this appeal on a certificate of importance by the Appellate Court.

The first contention of the appellant is that the judgment of the Appellate Court and the circuit court's decree should be reversed for the reason that Hacken, as lessee, had no right to maintain such a proceeding under section 30 of the Mechanic's Lien law, as that statute confers such right only upon the owner of the property or someone claiming a lien thereon. By the provisions of section 1 of the Mechanic's Lien act the contractor's lien extends to an estate in fee, for life, for years or any other estate, or any

right of redemption or other interest which such owner may have in the lot or tract of land on which the improvement is made. By section 21 of the act the sub-contractor's lien extends to the same character of an estate, right or interest. An owner, within the meaning of said section 1, is one who has had improved any tract or lot of land in which he has such an estate, right or interest defined and set forth in section 1. (*Paulsen v. Manske*, 126 Ill. 72; *Sorg v. Crandall*, 233 id. 79.) The words "the owner" in section 30 have the same meaning as they do in section 1, and have reference to anyone having such an estate, right or interest as aforesaid, whether his estate, right or interest be one in fee, for life, for years or for any other interest. That section expressly gives the owner, or any person having such a lien, the right to file a bill or petition in the proper court for a settlement when there are several sub-contractors' liens, or claims for such liens, against the premises, if he shall fear that there is not a sufficient amount due the contractor to pay all such liens. The contractor and all persons having liens upon the premises, and all persons who are interested in the premises, shall be made parties to such a bill. That section further provides that the amounts due all lienors shall be ascertained and the rights of all parties declared, and that the premises may be sold as in other cases under the act, and that all claims shall be prosecuted under like requirements as are directed in section 11 of the act. Hacken was an owner of an estate for years and had the right to file his bill under section 30, and he was required to make parties to his bill all persons of every character claiming liens against the premises, and all persons interested in the premises, including other owners, if any, whose interests might be subject to such liens or affected thereby. Any of the parties claiming liens and made parties to his bill had a right to file intervening petitions or answers in the nature thereof, or a cross-bill, if they chose to do so, and make the Rollbergs parties defend-

ant thereto and have the question determined as to whether or not the interests of the Rollbergs are subject to their liens, and the court properly so ruled. The burden was upon the lienors to prove every fact required by the statute to establish their right to a lien on the premises, either against the interest of Hacken, the lessee, or against the interest of the appellant as owner of the fee. *Kankakee Coal Co. v. Crane Bros. Manf. Co.* 128 Ill. 627.

The claim of appellant that the court had no jurisdiction of her person because none of the lienors had express permission to make her a party defendant to their petition or to the cross-bill is not tenable. The court expressly gave all of the parties leave to file their petitions and cross-bills, and she was made a party defendant thereto and filed both pleas and answers to said petition and cross-bill. She thereby submitted to the jurisdiction of the court, and she would be bound by whatever decree the court properly entered against her. If assent of the court was necessary to make her a party defendant, as aforesaid, the court gave its assent by trying the issues and entering its decree. There is no ground, therefore, for the further claim that the liens are barred by the Statute of Limitations. The filing of a petition is the institution of the suit, and when a new party is made by amendment the suit is brought, as to him or her, from the date of the amendment. (*Bennitt v. Wilmington Star Mining Co.* 119 Ill. 9.) The fact that appellant did not answer the petition or the cross-bill until after the limitation had expired is of no significance in this case.

The Mechanic's Lien act only gives to contractors and sub-contractors a lien against an owner or his interest in the land or lot improved when such improvement is made by a contract or contracts, expressed or implied, or partly expressed or implied, with such owner, or with one whom such owner has authorized or knowingly permitted to contract with the contractor for the improvement. The defense or claim of appellant that she did not make any such

contract with the contractor and did not authorize or knowingly permit Hacken to contract with the contractors for the improvement in question must be sustained. The evidence mainly relied upon by appellees for their claim that the Rollbergs authorized or knowingly permitted the contract for the improvement are two separate printed clauses in the lease to Hacken, found in the second and fourth paragraphs of the lease, respectively. The provision in the second clause reads: "That the said party of the second part [Hacken] will keep said premises in good repair, and will immediately replace all broken globes, glass or fixtures with those of the same size and quality as that broken." The fourth clause provides that Hacken will not permit any alterations of or upon any part of said demised premises except by written consent of the lessor, and that "*all alterations and additions to said premises shall remain for the benefit of the lessor, unless otherwise provided in said consent.*" The italicized words of the quoted portion of this clause as printed in the lease are underscored with a red ink line drawn by pen. The plain meaning of these two provisions of the lease is that Hacken shall keep said premises in good repair, and the word "repair" has its ordinary meaning in this clause as given in Funk & Wagnall's New Standard Dictionary: Restoration after decay; waste; injury or partial destruction; supply of loss; reparation. It does not include, in this lease, alterations or additions that the lessee may choose to make. Alterations and additions are provided for in the fourth clause of the lease, as aforesaid, and the express provisions of the lease forbid the lessee from making any alterations whatever except by written consent of the lessor. No such written consent was ever given by the lessor, and there is no contention that he did. The quoted provision that all alterations and additions to said premises shall remain for the benefit of the lessor unless otherwise provided in said consent is a provision merely as to the ownership in case such improvements are made.

The fact that the words are underscored with red ink does not in the least change their meaning but merely emphasizes or calls attention specially to such provisions. We have read all the provisions of the contract of Hacken with the contractors, and the contract clearly provides for the making of alterations and additions, and not for repairs, simply. The lease, therefore, in our judgment, is positive and express evidence that no such alterations and additions can be made by the lessee until he is authorized to do so by a further writing.

The other evidence in the record discloses that Henry A. Rollberg was a paralytic and was never at the building after the lease was made, and there is no evidence in the record that appellant was ever there or had in any way consented to the making of such improvements or knew anything about there being any alterations or additions contracted for or made. It does appear that Edward Rollberg, a son of the Rollbergs and who was not living with them, told Hacken, at the time negotiations were in progress for the lease, that there was an adequate sewer or catch-basin on the premises. Afterwards, when it was discovered that there was no such sewer or catch-basin, Edward inquired about the cost of building a sewer or catch-basin and authorized the work to be done and agreed to pay for it when the sewer or catch-basin was completed, and he carried out his agreement. He testifies positively that neither his father nor mother authorized him to represent them and that he never discussed with either of them the work that was being done there, and denied that he gave any directions about any of the alterations or any changes in the plan. There is no contradiction of his testimony except in one particular, in which it was shown by another witness that he directed a certain eight-inch beam used in connection with the alterations, to be changed to a twelve-inch beam. The interest of the lessor cannot be subjected to a

mechanic's lien for the subsequent construction of alterations and additions to the building, in the absence of any showing that he or she authorized or consented to the same. *Sorg v. Crandall, supra*.

Section 89 of the Torrens act provides: "In all cases where, by any law in relation to the liens of mechanics or others, any claim or notice is authorized to be filed in any court or office, the same, when it relates to registered land or any interest therein, may be filed in the registrar's office, and being so filed, a memorial thereof shall be entered by the registrar, as in the case of other charges, and proceedings to enforce the lien may be had, as provided in the act, creating the same. Until it is so filed and registered, no such lien shall be deemed to have been created." Section 90 provides: "No statutory or other lien shall be deemed to affect the title to registered land until after a memorial thereof is entered upon the register, as herein provided." (Hurd's Stat. 1917, p. 682.)

Section 1 of the Mechanic's Lien act provides that the lien of the contractor against the owner and his premises shall attach as of the date of the contract. Section 7 provides that no contractor shall be allowed to enforce such lien against any other creditor, incumbrancer or purchaser unless within four months after completion, or, if extra or additional work is done or material is delivered therefor, within four months after the completion of such extra or additional work or the final delivery of such extra or additional material, he shall either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien, verified by affidavit of himself or his agent or employee. Such claim for lien may be filed at any time after the contract is made and within two years after the completion of said contract or the completion of any extra work or the furnishing of any extra material thereunder, and

as to such owner may be amended at any time before the final decree.

Appellant contends that as said two sections of the Torrens act were not complied with, no liens were ever created in favor of the lienors. Appellees claim that all the provisions of the Mechanic's Lien act are to be literally enforced, and that any provisions of the Torrens act repugnant thereto must be held repealed by implication, as the Lien act was enacted in 1903, after the Torrens act was enacted, in 1897.

For the purposes of the decision of the points now involved it will be considered as a fact that appellees never complied with said two sections of the Torrens act by filing their claims or notice of their liens in the registrar's office. There was filed May 19, 1914, with the registrar, and by him duly entered in the register of titles, a notice of *lis pendens*, as provided by section 84 of the Torrens act. The Torrens act was approved and in force May 1, 1897, but the provisions thereof do not apply to land in any county until adopted by a vote of the people of the county. All recorders and *ex-officio* recorders of deeds in the several counties in the State shall be registrars of title, and their deputies deputy registrars, when the act is adopted. The object of the Torrens system was to create an independent system of registration of land titles, and that all instruments intended for the purpose of passing or affecting any title to real estate should be filed and registered in that department and no other. (*McMullen & Co. v. Croft*, 96 Wash. 275.) It was held in that case that the obvious purpose of the Torrens system is to create a presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities, and that this is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. By section 54 of the Illinois Tor-

rens act a deed, mortgage, lease or other instrument purporting to convey, charge or otherwise deal with registered land, or any estate or interest therein, other than a will or a five-year lease of land in possession of the lessee, shall take effect only by way of contract between the parties thereto and as authority to the registrar to register the same when compliance has been made with the terms of the act. The main object of our statute in thus limiting the effect of a deed or other instrument affecting real estate is to compel the grantee or party interested in the title of the record owner to register his title or interest in the registrar's office, in order that subsequent purchasers or parties dealing with the title may have notice of such title or interest. A careful examination of the whole act will clearly disclose that sections 89 and 90 of our Torrens act, when considered with the provisions of the Mechanic's Lien act, were particularly enacted in the interest of parties who might become purchasers or otherwise interested in the land of the owner of the registered title after mechanics' liens had attached. They were not intended to enable any record owner to defeat a lien given by the Lien act.

Our Mechanic's Lien law now in force was passed in 1903 and is a complete revision of the Mechanic's Lien law as it existed in 1895. By section 40 thereof the act of 1895, and all other acts and parts of acts inconsistent with the act of 1903, are repealed, saving any rights existing or actions pending at the time the act took effect. While the act of 1903 repealed the act of 1895, still all provisions of the act of 1895 that were re-enacted in the act of 1903 are to be construed as still in force and not as a new enactment. (Hurd's Stat. 1917, chap. 131, sec. 2.) While all such sections were repealed, they were re-enacted at the same moment that they were repealed and hence did not at any time cease to be the law. Section 7 of the act of 1903 is almost literally a re-enactment of section 7 of the law of 1895, the principal difference between the two enactments being that

the contractor under the act of 1895 must file his claim for lien four months after the last payment on his contract shall have become due and payable, and under the act of 1903 the same is to be filed within four months after the completion of the work or after additional work is completed or the material therefor is delivered. Sections 89 and 90 of the Torrens act in express terms recognize the Mechanic's Lien act, and there is no section in the Torrens act that was enacted with a view to repeal any section of the Mechanic's Lien act of 1895. The requirements of section 89 of the Torrens act are, in substance, that the claim or notice for a lien mentioned in section 7 of the Mechanic's Lien act shall be filed in the registrar's office instead of in the circuit clerk's office, with the further provision that until so filed and registered no such lien shall be deemed to have been created. The meaning of this last provision is, that the contractor's lien or right shall only have the force and effect of a contract until notice of the contractor's claim is filed and registered as aforesaid. When filed within two years the lien attaches as to the owner as of date of the contract. As our Torrens law was enacted after the Mechanic's Lien act of 1895 and in recognition of its provisions, we must also assume that the legislature intended both acts to be interpreted with reference to each other, and that such a construction should be put upon them that both acts would be effective, if possible, and that neither of them was intended to be repugnant to the other. Therefore, by properly applying the rules of construction in such cases, we are to understand that under section 89 of the Torrens act and section 7 of the Lien act the contractor had four months under the act of 1895, as therein provided, within which to file his notice of claim as against subsequent purchasers, creditors, etc., of the owner, and that he now has the four months as provided in the act of 1903 in which to file such claim as against the same parties, and that he may file it at any time after the contract is made, and as to

the owner at any time within two years after the completion of the contract or extra work, etc. It is equally clear that in every county where the Torrens act is in force such claim should be filed with the registrar of titles and not with the circuit clerk and entered in the register of titles in the registrar's office. This requirement is in reality the only change that the Torrens act makes in any of the provisions of the Mechanic's Lien act, except the further provision in section 84 which requires a certificate of the pendency of a suit to be filed with the registrar as *lis pendens*. It was contemplated by the Torrens act that the circuit clerk, who is in many of our counties *ex-officio* recorder, might also become the registrar under that act. When both of said acts apply and the interests of subsequent purchasers, creditors, etc., are involved, the proper interpretation of the Lien law is that said notice of claim or of lien shall be filed with the proper recorder of the title of the land to be affected,—*i. e.*, with the registrar,—and that a memorial thereof shall be by him entered in the register of titles in the Torrens department. When so filed and entered within the four months, as provided in the Lien act, the lien attaches as against subsequent purchasers, creditors, etc., as of date of the contract with the contractor, but until so filed and entered the claim of the contractor is merely, in effect, that of a contract with the owner. Either of the interpretations contended for by the parties to this suit would result in one of said acts destroying the effect of some distinctive provision of the other act,—*i. e.*, in a repeal by implication, which is not favored by the law and the decisions of this court. Where two acts which apparently cover the same subject have been passed by the legislature, they must be construed, if possible, so that each shall have due effect. In such case the later act, or the act varying in some minor degree the procedure or requirements necessary to obtain the relief given by the statutes, instead of being construed to be a repeal of the former or other act, should be held

to be an amendment or modification of it. *Village of Ridgeway v. Gallatin County*, 181 Ill. 521.

It follows from what has already been said that appellant's defense under the Torrens law could not be sustained, as all the petitions for liens were filed within the two years mentioned in section 7 of the Lien act. We have passed upon this question only because of the fact that public interests were involved in the questions raised under the Torrens act, and for which reason this court permitted the State's attorney of Cook county and counsel for the Torrens Land Title Registration League to file briefs and arguments in support of the Torrens act. The rights of subsequent purchasers, creditors, etc., do not arise in this case, as there are no such parties to it.

For the reasons aforesaid the judgment of the Appellate Court and the decree of the circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

(No. 12279.—Reversed and remanded.)

THE CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff
in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—
(THOMAS F. CLARK, Admr., Defendant in Error.)

Opinion filed June 18, 1919—Rehearing denied October 8, 1919.

1. WORKMEN'S COMPENSATION—an employee engaged in inter-State commerce is not subject to State Compensation act. Where the work at which an employee is engaged at the time of his injury is a part of the inter-State commerce in which a railroad is engaged the employee is not entitled to compensation under the Workmen's Compensation act, but his remedy, if any, is under the Federal Employer's Liability act.

2. SAME—injury in inter-State commerce is within Federal Employer's Liability act, regardless of who causes it. If an employee of a railroad is engaged in protecting the instrumentalities of the

inter-State commerce of his master and is killed in the course of this employment his injuries arise out of the employment and the cause is one within the scope of the Federal Employer's Liability act, regardless of who inflicts the injury causing the death.

3. *SAME—when injury to flagman at public crossing occurs in inter-State commerce.* Where the railroad tracks at a public crossing are used in both inter-State and intra-State commerce and one of the railroads using the crossing employs a flagman to prevent collisions with vehicles the flagman is engaged in inter-State commerce, and liability for his death when struck by a train while in the performance of his duties is governed by the Federal Employer's Liability act though the train was not a train of his employer but of the other company, which had an arrangement by which it reimbursed the employer for one-third of the flagman's wages.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

PATTON & PATTON, (SILAS H. STRAWN, of counsel,) for plaintiff in error.

GEORGE M. MORGAN, for defendant in error.

MR. JUSTICE THOMPSON delivered the opinion of the court:

This is a writ of error sued out by the Chicago and Alton Railroad Company to review the judgment of the circuit court of Sangamon county, affirming an award of the State Industrial Commission in favor of Thomas F. Clark, administrator of the estate of Thomas Clark, deceased. The circuit court has granted a certificate that the cause is a proper one to be reviewed by this court.

Several questions are raised and argued in the briefs. It is first necessary to consider and decide whether there can be a recovery in this cause under the Illinois Workmen's Compensation act or whether the cause is comprehended within the meaning and scope of the Federal Employers' Liability act. It is contended by the plaintiff in error that the deceased was employed in interstate com-

merce, and if this position is sustained it will be unnecessary to consider the other questions involved.

The plaintiff in error filed a special appearance denying that the commission had jurisdiction, for the reason that at the time deceased received the injuries which resulted in his death plaintiff in error was engaged in interstate commerce and the deceased was employed and working in such interstate commerce, and that therefore the Federal Employers' Liability act controls, superseding all State laws on the subject.

The evidence showed that Sangamon avenue is a main traveled highway running into the city of Springfield and that it crosses the tracks of plaintiff in error and of the Chicago, Peoria and St. Louis Railroad Company at the point where this accident happened. At this point there are six railroad tracks running practically north and south. Beginning at the east side and crossing west the tracks are as follows: The Alton lead going into the yard; the north-bound main of the Alton; the south-bound main of the Alton; the Chicago, Peoria and St. Louis main; the Chicago, Peoria and St. Louis mine switch, and the Alton mine switch. These tracks all parallel each other close together. The nearest highway crossing south of this point is about half a mile away and the nearest highway crossing north is about a mile. The traffic of the city converges across this crossing. There is a coal mine about 200 yards north of Sangamon avenue, on the west side of the tracks. In addition to the ordinary vehicular and pedestrian traffic across these tracks there are heavy loads of farm products and coal and great numbers of automobiles and automobile trucks that cross there. An ordinance of the city of Springfield required these railroads to jointly maintain a flagman at the Sangamon avenue crossing, and by a contract between the roads the Alton employed the flagman and paid his wages and the Chicago, Peoria and St. Louis Railroad Company reimbursed the Alton for one-third of the cost.

Pursuant to this contract the Alton employed Thomas Clark as such flagman. On September 17, 1916, while the deceased was on duty at this crossing, a train of the Chicago, Peoria and St. Louis Railroad Company approached the crossing from the south on its tracks and at the same time an automobile was approaching on Sangamon avenue from the east. Deceased moved over from the shanty to the track of the Chicago, Peoria and St. Louis Railroad Company, with his flag in his hand, holding it out, apparently to signal the automobile, and while standing on the rail of said track the train struck him in the back, killing him. There was no engine or train of the Alton approaching Sangamon avenue on any of the Alton's tracks from either direction at the time. The train which struck and killed Clark was carrying interstate freight. Practically all of the freight trains of the Alton which cross Sangamon avenue at this point carry interstate freight. All the tracks at this crossing are used indiscriminately for intrastate and interstate commerce.

The commission has found that the injury which resulted in the death of Thomas Clark arose out of and in the course of his employment by the Alton. Deceased was employed by the Alton for the purpose of preventing collisions between pedestrians or vehicles using Sangamon avenue and trains using the railroad tracks which crossed Sangamon avenue. He was employed to keep the tracks clear, so that nothing would interfere with the movement of the trains of plaintiff in error. A flagman not only protects the public from being run down by locomotives, but he likewise protects the railroad company from having its trains derailed and its equipment put into disorder by a collision with something upon its right of way. The main consideration heretofore with reference to maintaining flagmen has been the danger to the public which uses the crossing. With the coming into use of the automobile and the heavy automobile truck new considerations have arisen. A

ponderous, swiftly-moving locomotive, followed by a heavy train, is subjected to slight danger by a collision with a crossing pedestrian or a span of horses and a light vehicle, but when the passing vehicle is a ponderous steel structure a collision threatens not only the safety of its occupants or load but also the safety of the passengers or freight on the colliding train. The record here clearly shows that a collision of a train with one of these heavy automobile trucks or wagons loaded with farm products or coal would in all probability demolish the vehicle and scatter its burden all over the crossing as well as derail the train and tear up the equipment of the railroad company. Such a collision on one of the six tracks would in all probability tie up all of the tracks for a time.

Was Thomas Clark, at the time he received this injury, engaged in interstate commerce? "A railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and, * * * notwithstanding its double use, those engaged in its repair or in keeping it in suitable condition for use are, while so engaged, employed in interstate commerce. Such work, it is said, is so closely related to such commerce as to be, in practice and in legal contemplation, a part of it. * * * Thus, it is clear that one employed in actually removing from the track any obstacles to the passage of trains, caused by a derailment or other accident, would be employed in interstate commerce in view of the decisions of the United States Supreme Court. He would be directly engaged in the repair of and putting again into condition for use that instrumentality of interstate commerce. The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose duties are, in part, to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of

such an employee to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader and extended to keeping the track itself in a suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track-walker, whose duty it is to see that the track is in a safe condition for the passage of trains; to that of the employee in the signal tower, whose duty it is to supervise and give signals for the passage of trains; and to that of the employee engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employees may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use.

* * * The duties of deceased, as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce, and, exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who, concededly, is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged, at the moment of the accident, in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to

be unrelated to the safety of the track as a highway of interstate commerce."

This quotation is from *Southern Pacific Co. v. Industrial Accident Com. of California*, 174 Cal. 8, and it is a case strikingly in point. There a crossing flagman was engaged in flagging the highway for an intrastate train and yet he was held to be employed in interstate commerce, where there was evidence that the track which he was protecting was used indiscriminately for intrastate and interstate commerce. The same reasoning was adopted in *Southern Pacific Co. v. Industrial Accident Com. of California*, 174 Cal. 16, where the flagman was working at the crossing of a side-track connecting the main line with the freight depot, the side-track being used indiscriminately for intrastate and interstate commerce. In arriving at this conclusion the California court cited *Texas and Pacific Railway Co. v. Rigsby*, 241 U. S. 33, which was a case where a switchman was engaged in taking some "bad order" cars to the shops to be repaired. The cars had been in service for about a month. The switching crew had pulled the bad order cars off the siding onto the main and left them there while the engine moved some other cars. The switchman climbed on the cars to lock the brake and while coming off one of these cars he fell because of a defective handle. In speaking of whether or not this injury came within the scope of the Federal Employers' Liability act the United States Supreme Court there said: "The doing of plaintiff's work, and his security while doing it, cannot be said to be wholly unrelated to the safety of the main track as a highway of interstate commerce, for a failure to set the brakes so as temporarily to hold the bad order cars in place on that track would have been obviously dangerous to through traffic."

In *Plass v. Central New England Railway Co.* 221 N. Y. 472, it is said: "The Central New England Company was a corporation engaged in both intrastate and interstate com-

merce. The husband of the claimant, while employed by it in cutting grass and removing poison ivy and other weeds along the line of its railroad in New York State, contracted ivy poisoning, which caused his death. * * * If there was any evidence that the work contributed to the safety and integrity of the railroad the work was connected with and a part of interstate commerce by the railroad. * * * The object of the work was the safety of the bridges of the railroad and of the adjoining property and to keep fires from spreading. If the grass and weeds caught fire it might destroy parts of the railroad, and the weeds and grass not cut and removed would to a certain extent destroy the track,—would come upon the track and cause the engines to slip.”

In *Graber v. Duluth, S. S. & A. Railway Co.* 159 Wis. 414, it is said: “The test of whether the Federal act applies to any particular situation is not whether the particular person directly causing the injury was at the time thereof engaged in interstate business nor whether the act in which the person was engaged was exclusively an interstate commerce service, but whether the person or corporation charged with liability was engaged, at the time it occurred, in such commerce and the particular service in progress and environing or characterizing the employer’s activity at the time of the injury was of that nature, its cast in that regard being efficient if the work was a substantial part of interstate commerce. * * * If the particular act in any substantial part is within the interstate field, then the Federal law rules the situation if either party sees fit to stand upon legal right in the matter. * * * The law does not permit of splitting up a service which is in its nature an entirety, into its various steps or elements. Work in the repair of a bridge, as was said, which is used in intrastate as well as interstate business and is indispensable to both, and in moving material to the location of the bridge for the purpose of its repair, and in moving an

engine from the round-house to be used in hauling an interstate train, and work partly intrastate and partly interstate, as in preparing an engine to go out with a train made up of cars in interstate and intrastate service, are all parts of an entirety having the efficient interstate commerce features required by the Federal act. All work so closely related to interstate commerce business as to be practically inseparable from it, though it promotes at the same time intrastate business, is in reality and legal effect a part of the former."

A railroad servant killed by a passing train while shoveling snow on a railroad company's premises between a platform and the tracks, used indiscriminately for interstate and intrastate commerce, was then employed in interstate commerce. (*New York Central Railroad Co. v. Porter*, 39 Sup. Ct. 188.) A section laborer killed while working on the main track of a railroad used for interstate and intrastate commerce was held to be employed in interstate commerce, and that the consequent rights and liabilities arose under the Federal Employers' Liability act and the State statute did not apply. (*New York Central Railroad Co. v. Winfield*, 244 U. S. 147.) In *Pedersen v. Delaware, Lackawanna and Western Railroad Co.* 229 U. S. 146, an ironworker employed by the railroad company in repairing bridges and tracks was carrying some bolts with which to fix a girder in a bridge. This bridge supported tracks used indiscriminately for interstate and intrastate commerce. While crossing an intervening temporary bridge being used in both interstate and intrastate commerce he was run down by an intrastate passenger train. It was held that the railroad company was engaged, and Pedersen was employed by it, in interstate commerce. The court said: "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of in-

difference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depend in large measure upon this being done."

The Federal Employers' Liability act makes it clear that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce under conditions set forth in the act. In *Staley v. Illinois Central Railroad Co.* 268 Ill. 356, at page 376, we said: "Counsel for plaintiff in error argue that the title of the Federal Employers' Liability act, especially the phrase 'certain cases,' shows that Congress did not intend to cover all cases of injuries occurring on railroads while engaged in interstate commerce. With this we do not agree. We think the phrase 'in certain cases' was inserted * * * to limit it [the act] to those cases where the liability arose in interstate commerce. The wording of the statute and the reasoning in these decisions [decisions cited and discussed at length in the opinion] lead inevitably to the conclusion that 'the particular subject,' 'subject matter,' 'field' or 'chosen field' taken possession of by the Federal Employers' Liability act was the employer's liability for injuries to employees in interstate transportation by rail, and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in interstate commerce. The Federal Employers' Liability act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the

Federal government. Necessarily, all common or statute law of this State on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability act,—and that, too, regardless of the negligence or lack of negligence of either party to the litigation.”

In *Dickinson v. Industrial Board*, 280 Ill. 342, we held that if the work at which an employee is engaged at the time of his injury is a part of the interstate commerce in which a railroad is engaged he is not entitled to compensation under the State Compensation law but only under the Federal Employers' Liability act, if at all. We there said with respect to what constituted an employment in interstate commerce: “His employment need not be directly in the transportation of goods from one State into another or in the operation or movement of trains. If he is engaged in the operation, maintenance or repair of any of the instrumentalities used by the carrier in the transportation of goods from one State into another he is engaged in interstate commerce.” In the instant case deceased was engaged in the maintenance of the good order of the tracks of plaintiff in error,—one of the instrumentalities used by it in the transportation of goods in interstate commerce.

It has been contended by defendant in error that while the deceased may have been killed by a train engaged in interstate commerce he was not killed by a train of the plaintiff in error; therefore he was not engaged in interstate commerce of his employer. We cannot agree with this view. If an employee is engaged in protecting the instrumentalities of the interstate commerce of his master and is killed in the course of this employment, his injuries arise out of his employment and the cause is one within the scope of the Federal Employers' Liability act, regardless of who inflicts the injury causing the death.

In *Ruppell v. New York Central Railroad Co.* 157 N. Y. Supp. 1095, the defendant and another road used a common switching yard. The deceased was employed by the defendant, but at the time of his injury and death he was assisting in making up a train for the other user of the yards and received his injury by the negligence of the employee of the other user of the yards. In discussing this case the court said: "But the cars being made up into a train were not owned by defendant or to be run over its lines. They were passenger coaches to be run by the New York, New Haven and Hartford Railroad Company over its tracks to Springfield, Massachusetts. It is urged, therefore, that although deceased [a brakeman on one of these cars] may have been employed in interstate commerce he was not so employed by the defendant. Where, however, two railroads use a common switching yard in which the employees of one carrier form a switching crew which is actually making up cars into a train all of which is to go beyond State lines, those engaged in such switching are under the protection of the Federal act even if they are not moving the cars of their immediate employer. In such case this use of its switching crews makes the employer engaged in interstate commerce."

We therefore conclude that Thomas Clark, deceased, was at the time of his injury employed in interstate commerce, and that the liability of the plaintiff in error is entirely fixed and governed by the Federal Employers' Liability act. It follows that the Industrial Commission did not have jurisdiction of this proceeding, and the circuit court erred in not quashing the proceedings, record and award of the Industrial Commission.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

(No. 10638.—Rule made absolute.)

THE PEOPLE *ex rel.* The Chicago Bar Association, Relator,
vs. WILLIAM L. MARTIN, Respondent.

Opinion filed June 18, 1919—Rehearing denied October 8, 1919.

1. DISBARMENT—*diligence to client does not allow attorney to make a false affidavit.* There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it permissible for him to practice or attempt to practice a fraud on the court or to swear to that which is not true.

2. SAME—*when filing false affidavit will be ground for disbarment.* Where an attorney is willing to procure the filing of an affidavit which he knows to be false and in which he attacks the fairness of a trial judge without cause, such conduct will amount to subornation of perjury and of itself constitute sufficient ground for disbarment.

3. SAME—*general charge of reputation for dishonesty may be considered in connection with specific charges.* While a general charge of bad reputation for fair dealing and professional honesty is not, of itself, sufficiently specific to comply with rule 40 of the Supreme Court so as to form a basis for disbarment, it is competent to consider the respondent's general reputation for truth and ethical practices in connection with specific charges against him.

INFORMATION to disbar.

JOHN L. FOGLE, (JOHN E. KEHOE, of counsel,) for
relator.

WILLIAM L. MARTIN, *pro se.*

Mr. JUSTICE STONE delivered the opinion of the court:

Upon leave an information in the name of the People, on the relation of the Chicago Bar Association, praying that the name of the respondent, William L. Martin, be stricken from the roll of attorneys of this court, has been filed. The respondent filed his answer, and the cause was referred to the Hon. Charles T. Mason as commissioner. The relator took its testimony within the time limited by

the order of this court but the respondent failed to take his testimony within such time, whereupon a report was filed by the commissioner. Upon request of the respondent the cause was re-referred to the commissioner. The commissioner having died, a reference of the entire matter was later made to the Hon. Walter W. Ross, who heard the balance of the testimony of respondent and has made his report to this court.

The information contained eleven counts, and one additional count was asked by the relator to be added by way of amendment, but the motion therefor was denied by this court and is now renewed by the relator. The only counts referred to by the relator in its brief are the first, second, third, fourth, eleventh, and the additional count heretofore presented to this court on the motion of the relator to amend the information and which motion was denied.

The commissioner, Walter W. Ross, took the evidence and reported that the charges of misconduct in each of the counts except the eleventh, and the additional count, did not, in his opinion, authorize him to recommend the disbarment of the respondent. As to the eleventh count the commissioner finds that the general reputation of the respondent for truth and veracity in the city of Chicago is bad and that his general reputation for fair dealing and professional honesty as a lawyer is bad. The commissioner suggests and finds that the charges contained in the eleventh count be sustained, unless this court construes rule 40 to prohibit such general charges which fail to make clear and specific charges of misconduct. The respondent offered no proof as to his general reputation, and contends that under rule 40 of the rules of the Supreme Court there shall be filed an information making clear and specific charges, giving the time, place and acts of misconduct with reasonable certainty, and that he ought not to be disbarred under the evidence supporting this count. Exceptions have been filed by the relator.

The testimony was taken in shorthand, except the testimony of the respondent. Commissioner Ross directed the respondent, from time to time, to have the testimony transcribed and file the same with the commissioner. Although frequently promising to do so, respondent failed to do so up to the time of the filing of the commissioner's report. The commissioner reports that he is able to file a transcript of all the testimony presented to him except that, which appears on pages 44 to 175, inclusive, of the record, which are missing. Counsel for relator produced to the commissioner a receipt for these pages of the record and notice to respondent to return said testimony, which he has failed to do. The commissioner further reports that he has no knowledge of practically all of the witnesses who testified before commissioner Mason, deceased, and that he has not had the benefit of hearing their testimony.

Commissioner Mason, in his report now on file in this court, found on the first, second, third, fourth, sixth, seventh, ninth and eleventh counts that the respondent was guilty of the unprofessional conduct set out in each of the findings upon which evidence was taken before him, and recommended that the rule be made absolute and the respondent disbarred.

It is contended by the relator that the second commissioner, Ross, was placed in an unusual situation by reason of the fact that he only heard the respondent's evidence and was compelled to get the testimony of the complaining witnesses from the record, only, and that this condition accounts for the variation in the findings and recommendations of the two commissioners. It is urged that the exceptions of the relator to the second report should be sustained and the rule made absolute.

The first count in the information charges, in substance, that Blanche Woodward swore to an affidavit thereafter filed by respondent in the superior court of Cook county in a proceeding for alimony *pendente lite* by her against

Lindsey A. Woodward for separate maintenance, in which affidavit she averred that she owed the sum of \$163.64 to Carson, Pirie, Scott & Co. for certain wearing apparel purchased by her; that suit had been begun by said company against her and that she was not the head of a family residing with the same, and that her household goods were subject to the levy of an execution which might be issued in said matter. This affidavit was drawn at the direction and in the office of the respondent. Eleven days later the respondent, before the same notary public, who was a stenographer in the respondent's office, made oath to an affidavit of merits in the defense of the case in the municipal court of Chicago, wherein Blanche Woodward was being sued by Carson, Pirie, Scott & Co. for said item of \$163.64. In this affidavit respondent averred that he was the agent and attorney for Blanche Woodward and that he believed that she had a good defense to plaintiff's demand, stating that the goods, the purchase price of which was being sued for, were purchased by and upon the order of Lindsey A. Woodward for his own use and not for the defendant, and that the defendant does not owe the plaintiff the sum of \$163.64. This affidavit was filed by respondent in said case within two weeks after the affidavit of Blanche Woodward had been filed by him in the superior court. It is evident that respondent knew that Blanche Woodward had sworn that she owed said sum for the articles. He knew that his affidavit, therefore, was false. Such an affidavit was material in the case in which he filed it. Respondent must be held to have known at the time of making his affidavit that Blanche Woodward had made certain purchases; that she had received property thereunder and was liable to pay for the same. There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it necessary, under any circumstances, for him to practice or attempt to practice a fraud on the court or to swear to that which is not true, and when an attorney at law is willing

to perjure himself in the interest of his client, it is, doubtless, with full knowledge and appreciation of the responsibility resting upon him in so doing. Upon a review of the entire record pertaining to the first count, together with the reports of the commissioners concerning the same, we are of the opinion that the charges of the first count are sustained, and that the evidence under said count shows the respondent to have been guilty of unethical and unprofessional conduct tending to bring the profession into disrepute.

The second count charges that the respondent, with Israel E. Berger and others, entered into an arrangement to prevent the State of Illinois from collecting forfeitures on two criminal bonds signed by Berger to the People of the State of Illinois in certain proceedings in the criminal court of Cook county, by fraudulently conveying, without any consideration, the property of Berger. It appears from the evidence that a bill was filed in the superior court for the purpose of removing said conveyance as a fraud and of subjecting the property to an execution on a judgment and secure a sale of the property. A sale was ordered. On the morning of the sale respondent filed a bill for injunction against the sale of the property. Although he had represented the defendants to this bill, respondent procured the affidavit of one Fiedelman, represented by respondent, to the effect that he did not learn the sale was to take place until five o'clock on the preceding day. This count further charges that said affidavit was false and that respondent knew the same to be false, yet he appeared, filed said affidavit and secured the issuance of an injunction on said sworn bill. The injunction was set aside and a sale again ordered and advertised. On the day of the second sale respondent placed on file in the superior court of Cook county a second bill for injunction on behalf of another defendant represented by him, together with an affidavit of said defendant that he did not learn of the sale until four o'clock on the preceding day. This bill was filed under another

solicitor's name, but it is charged that it was prepared in the respondent's office, written on respondent's typewriter by his stenographer, and contained a number of interlineations in the handwriting of the respondent. An injunction was secured and later dissolved and the second bill dismissed, and an order was entered to sell the property, and the property was advertised for sale for the third time. It is further charged that the respondent caused a third bill for injunction to be filed against said sale; that this bill was prepared in respondent's office on his typewriter and sworn to by another of the defendants in the creditors' bill; that in the bill appear interlineations in the handwriting of the respondent and entries thereon in his handwriting. It is charged that in this bill the third defendant was caused by respondent to falsely swear that he did not obtain knowledge of said sale until five o'clock the day preceding the sale. The injunction secured thereby was later set aside and the bill dismissed. It is evident from a review of the testimony relating to this count that the conduct of the respondent was unethical and unprofessional and constituted a fraud upon the court. It is inconceivable that respondent could have in good faith directed these affidavits, when, if he was at all diligent in caring for his clients' interests, it is evident that he must have informed all of the defendants of the proceedings in the creditors' bill, as the same had been strongly contested.

The third count charges that in 1910 Thomas Kruzel and Agnieszka Kruzel were the owners of a small piece of property situated in Chicago on which there were two trust deeds. The first trust deed, for \$1000, was held by Alexander E. Glans, and a second trust deed for about \$600 was held by Johanna Heiland. When the note for \$600 became due the Kruzels went to respondent and turned over to him the sum of \$600 with which to pay off said note and trust deed. The money was not turned over by respondent to Johanna Heiland. Shortly after receiving the

\$600 respondent caused Israel Berger, who was associated with the respondent, to call upon the Kruzels and request the payment of \$450 additional, which sum the Kruzels turned over to Berger. It is charged further that since then payments were made from time to time on the second trust deed until it was eventually paid in full; that instead of securing a release of the same it was caused by Berger to be assigned to Eli Levy in February, 1915. Glans, the owner of the first trust deed, brought foreclosure proceedings, and respondent was retained by the Kruzels as their attorney in said proceeding and was paid \$20 on account of fees. It is further charged that respondent failed to file an appearance or answer in the proceedings on behalf of the Kruzels, and although he appeared before the master in chancery he permitted Levy to prove the second trust deed and to procure a decree to be entered on the same requiring payment of \$862.55. Thereafter, through the investigation of another lawyer, this situation was discovered. A report of the matter was made to the court and a further reference to the master was had and further evidence was taken. The master found that the respondent had been retained to represent the Kruzels; that he had failed to file an appearance or answer and permitted the \$600 note and trust deed to be introduced in evidence without objection on his part and without disclosing to the master the payment to him of the sum of \$600 or the further sum of \$450 paid to Berger, which sums the master found were paid for the purpose of discharging the incumbrance and other liens. The master further found respondent permitted a decree to be entered finding that the second trust deed was a valid lien. We have examined the record touching this count, and while these averments are denied by respondent and Berger, and while it is urged by respondent that Berger was responsible for the fraud upon the Kruzels and not himself, yet it is evident from the close association of these men that respondent must have been con-

versant with what Berger was doing in the matter. This is further shown by the fact that the respondent permitted proof to be made against his clients and a decree of foreclosure against them on the second trust deed when he well knew that the money had been paid to him for the purpose of paying off said trust deed. It is evident from the entire record regarding this count that had it not been for the interposition of other counsel substantial rights of the Kruzels would have been forfeited through the acts of respondent and Berger. We are of the opinion that the record substantiates the third count.

The fourth count charges that in a certain cause entitled *Wakins vs. Defrier* the respondent was retained as attorney of record for Josephine Defrier. After securing several postponements and delays in the trial of the cause and after it was announced by the court that further delay would not be allowed, the respondent procured Josephine Defrier to make an affidavit for a change of venue, in which it was stated that petitioner believed she could not receive a fair trial of said cause before any of the judges named in the petition because each of the said judges was prejudiced against her, naming nine judges sitting in the circuit court of Cook county. The count further avers that none of the judges mentioned in the affidavit knew anything concerning the merits of said cause or had any knowledge or information or acquaintance with either the plaintiff or defendant in the cause and that the affidavit when drawn up by respondent was known by him to be false. While this averment is denied by the respondent,—and in this denial he is corroborated by his associate, Berger,—yet it is evident from an examination of the entire record that the respondent knew that the affidavit was false and that he procured the filing of the same to delay the hearing of the cause. Such action on behalf of the respondent was not only dishonest but grossly unprofessional, and constituted unethical conduct toward the honor-

able judges in the circuit court named in the petition for change of venue. When an attorney is willing to procure the filing of an affidavit which he knows to be false and in which he attacks the fairness of a trial judge without ground, such conduct may amount to subornation of perjury and of itself constitute sufficient ground for disbarment.

The eleventh count of the information charges the respondent to be a man whose general reputation for truth, veracity, fair dealing and professional honesty as a lawyer in the city of Chicago is bad and that his general reputation as a practitioner among the judges on the bench and the members of the bar in Cook county is bad. The respondent contends such charges should not be considered for the reason that they do not comply with rule 40, requiring that charges be specific. While such a charge is not of itself sufficiently specific to comply with said rule so as to form a basis for disbarment, yet, as one of the qualifications of an attorney at law is that he be of good moral character, it is competent to consider his general reputation for truth, honesty, fair dealing and ethical practices in connection with specific charges filed against him.

Exceptions filed by the relator to the second commissioner's report will be sustained as to the first, second, third and fourth counts and overruled to the balance of said counts. Since the rule must be made absolute it will profit nothing to discuss the counts not herein found sustained. As to the first, second, third and fourth counts, we are of the opinion that the charges therein are sustained by the evidence.

The rule will therefore be made absolute and the name of the respondent stricken from the roll of attorneys.

Rule made absolute.

Mr. JUSTICE CARTER took no part in this decision.

(No. 12245.—Reversed and remanded.)

THE VILLAGE OF WINNETKA, Appellee, vs. W. L. TAYLOR
et al. Appellants.

Opinion filed June 18, 1919—Rehearing denied October 8, 1919.

1. SPECIAL ASSESSMENTS—*petition purporting to be signed by village attorney prima facie complies with statute.* An objection that the petition for a special assessment was not filed by an officer of the village, as required by section 37 of the Local Improvement act, cannot be sustained, where the petition filed purports to be signed by the village attorney and the record does not disclose whether or not a village attorney had been appointed.

2. SAME—*introduction of formal proofs makes prima facie case for petitioner.* In a special assessment proceeding the introduction of the formal proofs, consisting of the petition, certified copy of recommendation, estimate and ordinance, certificate of publication, affidavits of posting and mailing assessment roll, and affidavits and certificates thereto attached, constitutes a *prima facie* case for the petitioner, and all objections to the entry of the confirmation order must overcome the presumption raised by such *prima facie* case.

3. SAME—*time when a supplemental proceeding for deficiency may be begun.* Since the amendment in 1905 of section 59 of the Local Improvement act it is no longer necessary for a city or village to wait until the improvement has been completed before beginning a supplemental assessment proceeding to make up a deficiency. (*City of Chicago v. Noonan*, 210 Ill. 18, explained.)

4. SAME—*when section 11 of Local Improvement act, requiring publication of ordinance, must be complied with.* Section 11 of the Local Improvement act, requiring the publication of an ordinance for an improvement in excess of \$100,000, cannot be avoided by the levy of a supplemental assessment to make up a deficiency, where the board of local improvements is informed before the letting of the contract that the improvement will cost more than \$100,000; and in such case the improvement cannot be proceeded with without the further notice and consideration required by said section, although the order of confirmation has been entered on the original estimate and assessment roll.

5. SAME—*when a public hearing must be had on supplemental proceeding.* Section 59 of the Local Improvement act, requiring that where the deficiency exceeds ten per cent of the original estimate a public hearing shall be had on the supplemental proceeding, is jurisdictional, and in such case, if no public hearing is had, the county court cannot entertain a petition for supplemental assessment.

CARTER, J., dissenting.

APPEAL from the County Court of Cook county; the Hon. JOHN H. WILLIAMS, Judge, presiding.

MORTON T. CULVER, RAYMOND S. PRUITT, WILLIAM T. HAFEMAN, and ROBERT F. KOLB, for appellants.

FREDERICK DICKINSON, Village Attorney, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county confirming a supplemental special assessment for the construction of a pavement in Sheridan road, in the village of Winnetka.

The original assessment, known as No. 243, was confirmed as modified in the aggregate amount of \$85,067.19 and judgment entered therefor. The petition filed by the village attorney for an order of confirmation of supplemental special assessment No. 269 sets forth the following estimated statement of deficiency, to-wit:

Estimated total cost of work, being price at which contract has been let.....	\$114,982.81
Estimated deficiency in interest.....	5,104.03
Total	\$120,086.84
Assessment No. 243	85,067.19
Difference	\$35,019.65
Cost of making and collecting supplemental assessment.	2,101.17
Total estimated deficiency.....	\$37,120.82

Attached to the petition is the ordinance approving and recommending the improvement.

The objections filed and errors assigned and argued in this court are as follows: That the village of Winnetka is not incorporated under the City and Village act of 1872 but is a municipality by virtue of a special act of the General Assembly adopted in 1869, of which the court was bound to take judicial notice, in which act provision is made for local improvements by special assessment and in which village officers are designated, not including the village at-

torney; that the burden of proof was on the petitioner to show that the village of Winnetka had adopted an act entitled "An act concerning local improvements," approved June 14, 1897, in force July 1, 1897, and subsequent amendments thereto, and also article 9 of an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, upon objections being filed denying such adoption, and that without such proof the court was without jurisdiction; that the burden of proof was on the petitioner to show that the village attorney was an officer of the municipality authorized by the Local Improvement act to file the petition in question for an order of confirmation; that the petitioner did not comply with section 11 of the Local Improvement act relative to an estimated cost in excess of \$100,000; that the court erred in the giving and refusing of the instructions.

It is contended by appellee that the court will take judicial notice of the special act of the legislature approved March 10, 1869, providing a special charter for the village of Winnetka and the authority therein contained to make local improvements by special assessment; that the village of Winnetka having adopted, by ordinance legally passed and approved, article 9 of the City and Village act prior to the passage of the Local Improvement act, is authorized by said act to construct local improvements by special assessment in accordance with its terms; that it is sufficient to specify the village attorney, in the ordinance providing for the supplemental assessment, as the officer to file the petition in the name of the municipality for an order of confirmation; that section 11 of the Local Improvement act does not apply to a petition for an order of confirmation of a supplemental assessment.

It is first contended by the appellants that the village of Winnetka was without authority to institute special assessment proceedings under the Local Improvement act. It appears from the record that the village of Winnetka is

organized and incorporated under and by virtue of a special act of the legislature approved March 10, 1869. Paragraph 6 of section 4 of article 3 of said special charter provides the powers of said village, as follows: "To open, alter, abolish, widen, extend, establish, straighten or otherwise improve and to keep in repair streets, lanes and alleys, sidewalks, drains, sewers, culverts and bridges, and to have exclusive power and control over the same." Other sections of the special charter provide with particularity the method of instituting and levying special assessments and with the taking of private property for public use.

The Local Improvement act, as shown by section 1, vests the power to make local improvements in four classes of corporate authorities. That section provides: "That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law, by special assessment, or by special taxation, of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe: *Provided*, that this act shall apply only to such cities and villages as are now, or shall hereafter become, incorporated under an act entitled, 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, and to all cities, villages and incorporated towns which have heretofore adopted article 9 of the act above mentioned, in the manner therein provided, or shall hereafter adopt this act, as herein provided; but all other corporate authorities, having power to levy special assessments or special taxes for local improvements, may make use of the provisions of this act for that purpose in the manner hereinafter provided."

It appears from the evidence that the village of Winnetka, by an ordinance passed May 7, 1879, adopted article 9 of the City and Village act of 1872 and the amendments thereto, and it is contended that the village belongs to that class of corporate authorities having power to levy

special assessments which may make use of the provisions of the Local Improvement act in the manner therein provided. The record contains no evidence offered in support of the objection that the village of Winnetka was without authority to proceed in the levying of special assessments under the Local Improvement act, and under the condition of the record here, we are of the opinion that the village comes within the class contemplated by section 1 of the Local Improvement act, and that it had power and authority, under said act, to institute special assessment proceedings for said local improvement.

It is also contended by appellants that since the act of 1869, creating the charter of said village, provides the proceedings to be followed in the making of local improvements and designates the officers of the village but does not provide for a village attorney, there was no such officer of the village whom the law would recognize, and that therefore, when the ordinance providing for the improvement in question provided that the village attorney file a petition for confirmation in the name of the village, there was no officer representing the village whose petition could give the court authority to consider the same. Section 37 of the Local Improvement act provides as follows: "Upon the passage of any ordinance for a local improvement pursuant thereto, it shall be the duty of the officer specified therein to file a petition in some court of record in said county, in the name of such municipality, praying that steps be taken to levy a special assessment for the said improvement in accordance with the provision of the said ordinance." Section 2 of article 3 of the charter of the village of Winnetka provides as follows: "The council shall have power by resolution or ordinance to appoint other officers and agents to perform special duties and fix the compensation therefor." The record does not disclose any proof on the question whether or not a village attorney had been appointed for the village, while the petition filed purports to

be signed by such officer. It has been frequently recognized by this court that the introduction of the formal proofs, consisting of the petition, certified copy of recommendation, estimate and ordinance, certificate of publication, affidavits of posting and mailing assessment roll, and affidavits and certificates thereto attached, constitute a *prima facie* case for the petitioner, and all objections, legal or otherwise, urged against the entry of the confirmation order must overcome the presumption raised by such *prima facie* case. (*Village of Oak Park v. Eldred*, 265 Ill. 605; *People v. Culver*, 281 id. 401.) We are of the opinion that the statute conferring jurisdiction has been complied with.

It is contended on the part of the appellants that by reason of the fact that the estimated deficiency, when added to the original estimate, brought the cost of the improvement to over \$100,000, the ordinance providing for said deficiency should have been published as required by section 11 of the Local Improvement act, which provides as follows: "Upon the presentation to the common council or board of trustees of such proposed ordinance, together with such recommendation and estimate, if the said estimate of cost shall exceed the sum of one hundred thousand dollars (\$100,000) (exclusive of the amount to be paid for land to be taken or damaged,) such ordinance shall be referred to the proper committee, and published in the proceedings of the council or board of trustees, in the usual way, in full, with the recommendation and estimates, at least one week before any action shall be taken thereon by the council or board of trustees."

The cases of *City of Waukegan v. Lyon*, 253 Ill. 452, and *City of East St. Louis v. Davis*, 233 id. 553, cited by appellants, were cases where the original estimate exceeded \$100,000. In the case of *Kerfoot v. City of Chicago*, 195 Ill. 229, also cited by the appellants, the improvement was divided into three parts and three ordinances were passed. They were nevertheless held to be a single improvement

and to come within the provisions of said section 11. Those cases are not entirely in point here. The question here is whether or not the village board of trustees has the power in all cases to provide by ordinance for a local improvement which in fact is to cost in excess of \$100,000 and avoid the publication and reference provided for in section 11 if the estimate submitted is less than \$100,000. The purpose of section 11 is to secure additional notice to the property owners and others interested, and additional consideration, through committees, of those improvements costing in excess of \$100,000. Obviously it was not the intention of the legislature to provide a means whereby the city council or village board may avoid the provisions of section 11 by the use of an estimate showing a cost less than \$100,000 when the known cost of the improvement is, in fact, much more than that sum. Here the order of confirmation of the original assessment roll was entered on May 12, 1917. The record does not disclose when the bids were received and the board of local improvements thereby informed as to what the total cost would be, but it does show that the board had knowledge of the cost on July 5, 1917, when a resolution of that board directing the president thereof to prepare an estimate of the deficiency recites that such bids had been received. This, evidently, was before the contract was let. The record also shows that the estimate of deficiency was made up and filed July 12, 1917, and that the certificate of first voucher for work done on the original estimate was dated October 4, 1917. It is therefore evident that before the contract was let it had become definitely known to the board of local improvements of the village that the cost would be far in excess of \$100,000.

While it is true, as was said by this court in *City of Nokomis v. Zepp*, 246 Ill. 159, that "the best estimate possible will prove too high or too low," yet where, as in this case, the board was informed, immediately upon opening the bids, that the improvement would cost in excess of

\$100,000, such improvement should not have been proceeded with without the further notice and consideration required by section 11. While it is true that the order of confirmation had been entered on the original estimate and assessment roll and the village would therefore be required to dismiss said petition and start proceedings again, yet it is provided in section 56 of the Local Improvement act that the petition may be dismissed at any time before the letting of a contract and issuance of bonds, upon a showing that no contract has been let or bonds issued or that the project has been abandoned, etc. The first proviso of section 59 of said act authorizes the village to dismiss the petition and start a new proceeding after submission of an estimate for deficiency. These sections, together with section 11 requiring publication and reference to committee where the estimated cost exceeds \$100,000, show clearly the intent of the legislature that the village should not proceed with such an improvement without complying with section 11. To hold otherwise would be to enable the village board and board of local improvements to avoid the clear meaning and intent of the statute by submitting an estimate far below the actual cost of an improvement, and later an estimate for deficiency, in cases where the total cost of the improvement is known to be in excess of \$100,000.

It is also contended that section 59 of the Local Improvement act has not been complied with; that the village board is without power to pass an ordinance for a deficiency assessment until the work of the improvement is completed. This was held to be the rule in the case of *City of Chicago v. Noonan*, 210 Ill. 18, under section 59 as it then read. That section was thereafter amended by the act of May 18, 1905, to read as follows: "At any time after bids have been received pursuant to the provisions of this act, if it shall appear to the satisfaction of the board of local improvements that the first assessment is insufficient to pay the contract price or the bonds or vouchers issued or to

be issued in payment of such contract price, together with the amount required to pay the accruing interest thereon, said board shall make and file an estimate of the amount of such deficiency, and thereupon a second or supplemental assessment for such estimated deficiency of the cost of the work and interest may be made in the same manner as nearly as may be as in the first assessment: * * * *Provided, however*, the petitioner, in case it so elects, may dismiss the petition and vacate the judgment of confirmation either at or after the term at which the judgment of confirmation is rendered, and begin new proceedings for the same or a different improvement as provided in section 56 of this act as amended: *Provided, further*, that if said estimated deficiency shall exceed ten percentum of the original estimate, then a public hearing shall be had on said supplemental proceeding in like manner as in the original proceedings: *And, provided, further*, that no more than one (1) supplemental assessment shall be levied to meet any deficiency where said deficiency is caused by the original estimate made by the engineer, being insufficient." It will be noted that the section as amended gives the village the right to make and file an estimate of the deficiency "at any time after bids have been received pursuant to the provisions of this act," when it shall appear to the board of local improvements that the first assessment is insufficient to pay the cost of the improvement. Since the amendment of section 59 the cases cited by appellants are no longer applicable.

It is further contended that section 59 was not complied with for the reason that there was no public hearing had upon the supplemental proceedings. The second proviso of section 59 provides that where the "deficiency shall exceed ten percentum of the original estimate, then a public hearing shall be had on said supplemental proceeding in like manner as in the original proceedings." Here the original estimate was \$85,067.19. The estimated deficiency was

\$37,120.82, or more than forty per cent of the first estimate. Under section 59 a public hearing should therefore have been had as in an original proceeding. This was jurisdictional, and no such public hearing having been held, the village board was without authority to pass the ordinance upon which the petition herein is based. The ordinance being passed without authority the petition did not vest the county court with jurisdiction, and the judgment of confirmation is therefore void.

Certain other objections have been urged, but as the case must be reversed for the reason given, they are no longer material.

The judgment of confirmation will be reversed and the cause remanded, with directions to the county court to dismiss the petition as to the property of objectors herein.

Reversed and remanded, with directions.

Mr. JUSTICE CARTER, dissenting:

I do not agree with the conclusion of the opinion that the legislature intended, under such circumstances as are shown here by the record, to require the local board of improvements to advertise ten days because the estimates altogether amounted to more than \$100,000. When section 11, as to advertising when the estimate exceeded \$100,000, was passed the law then required that no supplemental assessment could be levied until the work was completed, but the Local Improvement act was afterward amended so as to permit a supplemental assessment to be levied at any time after the bids for the work had been received in accordance with the provisions of the act. I do not think there is anything in the amendment to indicate that the legislature had in mind, in any way, advertising, as provided in section 11, if the estimates together should amount to more than \$100,000. The construction given the Local Improvement act as amended in this regard puts something into the act that I do not think the legislature had in mind

at the time the amendment was passed. The effect of the opinion on this point, in my judgment, results in judicial legislation, entirely outside of legislative intention.

(No. 12101.—Affirmed in part.)

THE FEHR CONSTRUCTION COMPANY *et al.* Defendants in Error, *vs.* THE POSTL SYSTEM OF HEALTH BUILDING *et al.*—(CHAPIN & GORE, Plaintiff in Error.)

Opinion filed June 18, 1919—Rehearing denied October 8, 1919.

1. PRACTICE—*rule as to when judgment must exceed \$1000 to be reviewable on certiorari.* The provision of section 121 of the Practice act that in actions *ex contractu* or sounding in damages there must be a judgment for more than \$1000 to authorize the Supreme Court to entertain a petition for writ of *certiorari* to the Appellate Court applies to all cases, either at law or in equity, where the object of the suit is the recovery of money, only, and no other independent relief is sought, except actions involving a penalty.

2. MECHANICS' LIENS—*jurisdiction of Supreme Court to review mechanic's lien proceeding.* Claims for mechanic's liens are permitted, under the statute, to be joined and prosecuted as one suit, but in determining the jurisdiction of the Supreme Court to review the judgment of the Appellate Court on *certiorari* the judgments or decrees on the various claims must be regarded as separate and distinct.

3. SAME—*when court may admit evidence to show what items are lienable and amount thereof.* Where no definite price is agreed to in a contract for work and material furnished there is an implied contract for the reasonable cash market value thereof, and a court of equity may admit evidence for the purpose of showing what items are lienable and what is their value.

4. SAME—*what are alterations or repairs within meaning of Lien act.* Improvements which add to the height or depth of a building, or that change, increase or repair the interior accommodations thereof, are repairs or alterations within the meaning of the Lien act, and the lien attaches if any floor or room of the building is so repaired or altered.

5. SAME—*when fixtures are permanent.* Fixtures are permanent and not merely trade fixtures where they are firmly attached to the realty, are adapted to and necessary for the purpose for

which the premises are used and leased, and were intended by the parties to the lease to become a part of the realty.

6. *SAME—what rules for determining fixtures apply to lienor and lienee.* The rules for determining what are fixtures between landlord and tenant are not applicable between lienor and lienee, but the rules to be followed are those applicable between vendor and vendee, between mortgagor and mortgagee or between heir and executor, which are more strict than the rules as to landlord and tenant.

7. *SAME—owner who permits lessee to improve property is subject to Lien act.* An owner who agrees, without restriction, that his lessee shall place buildings or other improvements upon his property thereby authorizes or knowingly permits his property to be improved within the meaning of the Mechanic's Lien act, and cannot be heard to say, as against a claim for lien, that the cost is excessive or the improvement undesirable or unprofitable.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

WILLIAM S. NEWBURGER, and BENJAMIN P. RUEKBERG, for plaintiff in error.

BULKLEY, MORE & TALLMADGE, for defendant in error the Harty Bros. & Harty Company.

M. D. DOLAN, (FREEMAN K. BLAKE, of counsel,) for defendants in error James H. Roche and Pickett & Felden.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Defendant in error the Fehr Construction Company, as contractor, filed its bill in the circuit court of Cook county on May 8, 1912, to enforce a claim for a mechanic's lien against plaintiff in error, Chapin & Gore, a corporation, and the Postl System of Health Building, and their property known as Nos. 61-69 East Adams street. Thereafter leave was given by the court to the Harty Bros. & Harty Company, as a sub-contractor under the contract of the

Fehr Construction Company, and to E. J. Pickett and A. G. Felden, co-partners, James H. Roche, the Davidson Bros. Marble Company and Benjamin F. Hanson, as contractors, to file intervening petitions to establish their claims for mechanics' liens against said owners and their property. The Postl System of Health Building and the Central Trust Company, its trustee in bankruptcy, made default. Plaintiff in error filed its answer to the bill and the petitions. The causes were referred to the master in chancery, who made his report finding in favor of the lienors. Objections were filed by plaintiff in error to the master's report and findings, which were overruled by the court, and exceptions were then filed and overruled and decrees were entered in accordance with the master's report and for sale of the property. On appeal the Appellate Court for the First District affirmed the decrees in favor of the Davidson Bros. Marble Company and Benjamin F. Hanson, and those decrees are not pending in this court for review. The decrees in favor of the other defendants in error were all reversed by the Appellate Court and the causes were remanded, solely for the reason that in all the claims there were lienable and non-lienable items, the values of which were not disclosed either by the contracts or the record evidence. Thereafter the causes were re-docketed in the lower court and referred to the master in chancery, and he heard and reported the evidence as to the reasonable and customary value of the non-lienable items in the several contracts, and the court entered its decrees for liens in favor of the defendants in error for the other items held to be lienable. On the second appeal to the Appellate Court that court entered its order affirming the decrees. The causes are brought to this court for review on a petition for *certiorari*.

The first decision of the Appellate Court is reported as *Fehr Construction Co. v. Postl System of Health Building*, 189 Ill. App. 519, to which reference is made for a more complete statement of the facts and holdings of that court.

The court's decree in favor of the Fehr Construction Company is for \$743.95 and interest from March 22, 1912, to the date of the decree, July 8, 1916, of which principal sum the Harty Bros. & Harty Company, as sub-contractor, is decreed \$346.05 and interest. The decree in favor of E. J. Pickett and A. G. Felden is for the sum of \$240 and interest for the same. These contracts were entered into with Chapin & Gore's lessee, the Postl System of Health Building, the former being for the material and the construction of office partitions from floor to ceiling on the seventh floor of said building, with doors and lockers for the same, side partition to be tiled in part and plastered in part with two coats of plaster, and also for the material and the construction of twenty-three lockers and partitions seven feet high, including birch doors for lockers and locks, and an oak railing with two gates, all according to certain plans. The total contract price for said work and materials was for one lump sum, \$989, without specifying the price of any part of the work or material. There were extras amounting to \$204.95, itemized as follows:

Picture moulding, top of lockers.....	\$4.50
Rack for letter file.....	16.00
Furnishing and laying muslin.....	1.75
Replacing handles on filing cabinet, repairing doors.....	5.90
Two shelves, stenographer's desk.....	3.50
Oak shelf, visitor's register.....	4.00
Changing door and partition.....	9.50
Cutting and fitting around columns.....	6.50
Shelves in lockers.....	8.90
Difference in price of hardware.....	22.75
Plastering, patching in tailor shop.....	1.80
Shelving in buffet kitchen.....	6.55
Installing hooks.....	12.00
Installing keyboard.....	2.50
Boarding up around urinal.....	2.50
Putting three shelves in locker No. 2.....	1.00
For contract completed.....	989.00
Total.....	<u>\$1,098.65</u>

There was a general payment made on this contract of \$350 by the Postl System of Health Building. The con-

tract of Pickett & Felden was for furnishing the material and painting, enameling, varnishing and decorating the walls, partitions, woodwork, lockers, etc., on said floor, and was for one lump sum, \$365, including extras, \$40, and no price was specified for any individual part of the work or materials.

The basis of the claim of the contractors and the subcontractor for liens against plaintiff in error and its property is the charge that the plaintiff in error authorized or knowingly permitted its lessee to contract for or to make said improvements, and that they are permanent fixtures.

The court heard evidence as to the value of the work and materials employed in the construction of the twenty-three lockers and of a number of the other items of work and material furnished by the Fehr Construction Company under its contract which the court found to be non-liable and that the aggregate value thereof was less than the general payment on the contract of \$350, and applied the payment first upon those items in order to give the contractor its mechanic's lien for the other articles found to be liable, after deducting the remainder of the payment from the value thus found of the liable articles. The court also found that Pickett & Felden were not entitled to a lien for a portion of the work and materials furnished by them under their contract, which finding included the work and materials employed in painting and varnishing the lockers, and it appears also to include other items that are not identified by the record or by the briefs and arguments of counsel. The total value of such articles was found to be less than the general payment of \$125, and these contractors were therefore given a lien for the other items found by the court to be liable, for the total contract price less said payment.

All of the foregoing decrees are for liens under the Mechanic's Lien law, as above disclosed, and every one of them is for a much less sum than \$1000. The limitation of sec-

tion 121 of the Practice act that in actions *ex contractu* or sounding in damages there must be a judgment for more than \$1000 in order that the Supreme Court may grant a writ of *certiorari* to review the judgment of the Appellate Court applies to all cases, either at law or in equity, where the object of the suit is the recovery of money, only, and no other independent relief is sought, except cases involving a penalty. (*Lansing v. Dempster*, 255 Ill. 161; *Dime Savings and Trust Co. v. Watson*, 283 id. 276.) The suits for liens are distinct and separate suits, permitted to be joined and prosecuted under the statute as one general suit or proceeding, but must be considered as several and distinct claims or suits for the purpose of determining our jurisdiction on review by *certiorari*. The writ must therefore be dismissed as to said three suits, as we have no jurisdiction to review any of the decrees.

The contract between Roche and the lessee was verbal and for the installation in said building of a shower bath and other fixtures and appliances to be used in connection with it, the contract prices for which were not fixed either as to the material or appliances or for the work of installation. There was a payment of \$100 on this contract by the Postl System of Health Building. The Appellate Court found that this contract included items that were not permanent fixtures, and that they are not properly a subject matter of a lien under the evidence. These items included two electric cabinets, four curtains and hooks, standard bolts for curtains, and all labor employed in installing the same. The circuit court, on remandment, found the aggregate value of said items to be \$1739.54, and applied the \$100 payment on the contractor's claim for them. The Appellate Court held that the shower bath and other fixtures used in connection with it are alterations of the building, fixtures or improvements within the meaning of the Mechanic's Lien act, and not trade fixtures. The circuit court found that the reasonable market value of these fixtures, including the

work of installing them, is \$1755.46, and entered its decree for lien in that sum against plaintiff in error and said property. The shower bath on the seventh floor was connected with a water boiler twelve feet high and six to eight feet in diameter and of the capacity of 55,000 gallons, and another tank, both located in the basement. The connection with the shower bath was made by a circulating three-pipe system embedded in a groove in the walls. On the third floor these pipes are covered with asbestos and fireproof casing on the walls, which had to be removed to install the pipes and then replaced. Marble, five feet high on one of the walls, had to be removed and replaced to install the pipes, and the pipes on the seventh floor passed through the partitions out of sight and are covered by the michaelite tile, which is three inches thick. Connected with the hot water boiler by a two-inch pipe is a pneumatic pump for furnishing the necessary pressure for the shower bath, which is connected with a dynamo and also attached to the walls by lag bolts and four pipes anchored to the stones and cemented. The hot water boiler is embedded in the floor six inches. These fixtures were further connected to the water main in the street by water pipes and a water meter for this system, because the superintendent of plaintiff in error had so directed, as the amount of water to be used by the lessee would increase the water rates of the building. He required the lessee to pay for the water used by it. Other fixtures were also connected with the shower bath that were necessary parts thereof, and the toilet and the urinal were also installed in connection therewith and firmly fixed to the floor. The entire fixtures were necessary parts of one complete, connected system, which was installed and used for administering baths to the patrons of the lessee.

The premises were demised to the lessee to be occupied and used as a physical culture institute, to provide for business men a system of health building. That corporation

became bankrupt and ceased its business there before these suits were brought. The premises are now occupied by another tenant in the same business. The first and second floors of the building are occupied by plaintiff in error as a wholesale liquor house. The other floors were occupied and used by various tenants for various mercantile and business purposes, and the building, as disclosed by the evidence, was not designed or built for any particular character of business, but with the intention of leasing it to all such persons as might desire to rent it for business and pay good rent for the same.

The various improvements installed by the lessee of the plaintiff in error are clearly alterations or repairs of the building within the meaning of our statute, and the articles combined and installed by Roche are parts of those alterations, and they are so firmly attached to and embedded in the walls and floors of the building that they could not be removed without serious damage to the same. They are permanent fixtures. Our statute gives a lien to any contractor for improving, altering, repairing or ornamenting any house or other building, or to one who furnishes material, fixtures, apparatus or machinery to improve the same, by any contract, expressed or implied or partly expressed or implied, with the owner, or with one whom such owner has authorized or knowingly permitted to contract for such improvement. While Roche's contract fixed no definite price for the articles and material and work contracted for, there was an implied contract that the prices for the articles and material furnished should be their reasonable cash market value and for the work the usual and customary prices that obtained for such work. The contract was such that the part of the work and material that was lienable could be definitely distinguished and separated from the part thereof that was not lienable and the value or price thereof definitely fixed. The court therefore properly admitted evidence for that purpose and properly ap-

plied the payment on the items not lienable. *Haas Electric Co. v. Amusement Co.* 236 Ill. 452.

It is insisted by plaintiff in error that the machinery, materials, etc., furnished by Roche were not used in the building, altering, repairing or ornamenting of the building within the meaning of the Lien act. Improvements which add to the height or depth of a building, or that change, increase and repair the interior accommodations thereof, are repairs or alterations within the meaning of that act. (18 R. C. L. 914; *Grantwood Lumber and Supply Co. v. Abbott*, 80 N. J. L. 564.) The entire building of plaintiff in error was not altered or repaired, but that is not necessary, under our statute, to entitle the contractor to a lien. The lien attaches if any floor or room of the building is repaired or altered.

The articles installed are not trade fixtures, as insisted by plaintiff in error. They are fixtures firmly attached to the realty. They are adapted to and necessary for the purpose to which the portion of the premises leased is now devoted and for which it was leased. The parties to the lease intended that these fixtures and alterations should become a part of the realty. These three requisites of permanent fixtures necessarily determine and fix the irremovable character of said improvements so installed. (Note in Ann. Cas. 1912B, 21-25.) Annexation of appliances which are ordinarily to be considered personal property results from such appliances being connected as integral parts with a single system of machinery which as a whole has been annexed to the land. (Same note in Ann. Cas. 1912B, 27; *Dobschuetz v. Holliday*, 82 Ill. 371; *Haas Electric Co. v. Amusement Co. supra.*) The intention of the parties to annex the fixtures as a part of the realty is disclosed by the written lease of plaintiff in error to the lessee. It gives express permission to install the shower bath, and further provides that all alterations of the premises shall remain for the benefit of the lessor unless otherwise provided in a writ-

ten consent, and that the lessee will keep the premises in good repair. The rules for determining what are fixtures between landlord and tenant are not applicable between lienor and lienee. The rules to be consulted are those applicable between vendor and vendee and between mortgagor and mortgagee or between heir and executor. (Note in Ann. Cas. 1912B, 21). The rule as to what constitutes fixtures, as between an executor and an heir or as between a vendor and a vendee, is much more strict than between a tenant and a landlord. 1 Pope's Legal Definitions, 558; *Owings v. Estes*, 256 Ill. 553.

The evidence in the record is abundant to show that plaintiff in error authorized and knowingly permitted its lessee to contract for said improvements and that it directed the workmen and Roche where to place some of these fixtures. Besides, one who agrees with another that he shall place buildings or other improvements upon his property thereby authorizes or knowingly permits such other to improve his property within the meaning of the Mechanic's Lien law, and cannot be heard to say that the cost is excessive or the improvement undesirable or unprofitable when there are no restrictions as to the extent of such improvement. *Haas Electric Co. v. Amusement Co. supra*.

The decree of the circuit court, and the order of the Appellate Court affirming the same, as to defendant in error Roche are affirmed. The writ is dismissed as to the other defendants in error.

Affirmed in part.

2

INDEX.

ABATEMENT.—See PLEADING.

ACTIONS AND DEFENSES.	PAGE.
equitable title is no bar to recovery in ejectment—defendant in ejectment who is a trespasser cannot set up title in third person	99
tax collector can enforce collection of taxes only by lien of his warrant	170
what defense to a civil suit for libel is admissible under general issue	405
truth is a defense to charge of libel only when published with good motives and for justifiable ends.....	406
what matters are not a defense to libel suit but go only in mitigation of damages.....	406

ADMINISTRATION.

administrator has no inherent authority to conduct retail store business	142
claim for expenses of administration is not consistent with claim of lien for installments of rent arising out of a lease to the deceased.....	142
what are proper expenses of administration is question to be passed upon by probate court.....	142
contingent claims cannot be allowed under section 67 of Administration act	142
suit for installments of rent not allowable as a claim may be brought against representative or heirs of deceased..	143

ADMINISTRATION.—*Continued.*

PAGE.

what determines whether probate court shall allow claim not due—when a claim for future installments of rent is contingent	142
failure to close up estate does not change law as to allowance of claims.....	143
executors cannot appeal, as executors, from order of probate court in favor of estate.....	170
when an administrator <i>pro tem</i> need not be appointed...	171
proceeding under section 81 of the Administration act to compel the executor to inventory property is against him individually	171
when county court may control amount to be spent under bequest for markers for graves.....	568
court is not authorized to make election for insane heir and devisee unless clearly for best interests.....	568

APPEALS AND ERRORS.

when Supreme Court will not reverse judgment of conviction on evidence	372, 44
when, only, Supreme Court will interfere on ground that evidence does not support verdict in criminal case....	44
when questions cannot be considered on an appeal from a judgment for taxes.....	70
when objection to manner in which issue at law in a will contest case is submitted is waived on appeal.....	80
when question of revenue is involved—executors cannot appeal, as executors, from order of the probate court in favor of estate	170
certificate of judge is only proper method of showing what took place in his presence.....	182
when error in holding court at home of witness is harmless	189
judgment will not be reversed for matter of form.....	235
errors not presented to Appellate Court are waived.....	281
when Supreme Court cannot review question whether an injunction was properly dissolved.....	304
Supreme Court is not bound to search for errors.....	371
when existence of contract is a question of law for the Supreme Court	470
controverted questions of fact in action for wrongful death are settled by verdict of the jury and judgment of the Appellate Court	476
when appellee in tax case cannot assign cross-errors....	486
counsel must base argument in Supreme Court on matters found in record.....	494

APPEALS AND ERRORS.—*Continued.*

PAGE.

- discretion of court in setting aside default judgment or giving time to plead is not reviewable except for abuse.. 494
- when a freehold is not involved—when freehold is not involved in suit to rescind contract for purchase of land.. 527
- effect where bill of exceptions is stricken from files..... 574
- rule as to when judgment must exceed \$1000 to be reviewable on *certiorari*—jurisdiction of Supreme Court to review mechanic's lien proceeding..... 634

APPROPRIATIONS.—See TAXES.

ASSAULT.

- what must be proved to sustain charge of assault to commit murder 489
- when shooting at a police officer attempting arrest is not an assault to commit murder..... 489

ASSIGNMENTS.

- property of assignee of lessee cannot be pledged for rent by mere assignment of lease..... 143

ATTORNEYS AT LAW.—See DISBARMENT.

- when failure of attorney to exercise good judgment will not disbar—an attorney should exercise diligence in discharge of his duties..... 220

BANKS.

- banking partners should be indicted as individuals—banking partners may be jointly guilty of receiving deposits while insolvent 310
- when bankers' books may be introduced against them.... 310
- a witness cannot express opinion of solvency of bankers charged with receiving deposits while insolvent..... 311
- in a prosecution of bankers the depositors cannot testify that their deposits were lost..... 311
- when instruction as to considering value of surrendered stock should be given in case against insolvent bankers.. 311

BILLS AND NOTES.

- act of 1917, relating to false checks, did not repeal Confidence Game act..... 113

BILLS OF EXCEPTIONS.—See APPEALS AND ERRORS.

- effect where bill of exceptions is stricken from files..... 574

BURDEN OF PROOF.

PAGE.

burden is on the party contesting will to prove charge of undue influence	188
burden is on claimant in workmen's compensation case to prove accident arose out of employment.....	206
burden is on lienors to establish right to lien under the Mechanic's Lien act	589

CARRIERS.—See RAILROADS.

CHARITIES.

charitable uses are not within rule against perpetuities—gifts to charity are favored—when devise is to charitable uses	229
---	-----

CLOUD ON TITLE.

<i>laches</i> cannot be charged against owner in possession for failure to remove cloud.....	454
void sheriff's deed may be removed as cloud—redemption.	455

CODICILS.—See WILLS.

COLLATERAL ATTACK.—See JUDGMENTS AND DECREES.

CONFIDENCE GAME.

when defendant may be convicted under the Confidence Game statute—what constitutes the confidence game—valid contracts may be used.....	113
act of 1917, relating to false checks, did not repeal Confidence Game act.....	113

CONSPIRACY.

when a conviction for conspiracy to obtain property by false pretenses is authorized.....	281
Parole act of 1917 does not apply to crime of conspiracy..	281

CONSTITUTIONAL LAW.

there is no constitutional limitation as to agencies State shall adopt in providing free schools—the validating act of 1917 is valid.....	11
no limitation is placed on legislature with reference to formation of school districts and their power to tax...	70
sections 93 to 96, inclusive, of School law as amended in 1917 are not invalid.....	71

CONSTITUTIONAL LAW.— <i>Continued.</i>	PAGE.
when a statute will be given retroactive effect—a statute cannot deprive citizen of vested right.....	106
amendment to section 3 of the Police Pension Fund act is retroactive but is not invalid.....	106
the right to claim a police pension may be taken away by the State	106
act of 1885, providing for examination for license to practice medicine, is not invalid.....	235
the legislature is sole judge of what laws are necessary for protection of public health.....	235
exercise of police power must be reasonably necessary to accomplish legitimate object.....	236
legislature cannot invest administrative board with arbitrary power over rights of citizens.....	236
meaning of constitutional requirement that all elections shall be free and equal.....	241
General Assembly cannot bind its successor as to method of repealing an act.....	241
section 5b of Foreign Corporations act, as amended in 1917, does not impair the obligation of contracts.....	289
section 5b of Foreign Corporations act does not discriminate against foreign corporations.....	289
publication of statute creating a debt may be provided for in act itself—constitution must be construed with reference to its object.....	327
what vote of the people is required to adopt statute creating a debt.....	327
creation of a debt and levy of a tax to pay interest may be included in one act.....	327
provisions creating debt and levying tax to pay interest need not be voted on separately by legislature.....	327
provisions necessary to carry out purpose of act need not be expressed in title.....	328
act of 1917 for State-wide system of hard roads does not impose burdens on owners of motor vehicles.....	328
act of 1917 for State-wide system of hard roads does not assume debts of counties.....	328
in specifying objects of appropriation various items of expense need not be stated.....	328
legislature has absolute control over public highways—act of 1917 for State-wide system of hard roads is not local.	328
act of 1917 for State-wide system of hard roads does not delegate legislative or judicial power to department of public works	329
what is legislative power and what is judicial power.....	329

CONSTITUTIONAL LAW.— <i>Continued.</i>	PAGE.
paragraph (d) of section 8 of Workmen's Compensation act does not deny equal protection of the law.....	396
exercise of police power is not unconstitutional because it restrains liberty of citizens.....	442
statutes punishing wrongdoing without criminal intent are valid under the police power.....	442
section 15b of Motor Vehicle act does not deprive defendant of property without due process of law.....	443
act of 1913 to provide wash-rooms in certain employments is valid as a police regulation.....	523
property rights are subject to exercise of police power—the exercise of police power must be necessary and reasonable.....	580
contract rights are subject to exercise of police power—what is measure of reasonableness of police regulation..	580
what conduct is not subject to the police power—extent to which business of public utility may be regulated under police power.....	580
when the Public Utilities act does not abrogate an existing contract.....	581

CONSTRUCTION.—See CONSTITUTIONAL LAW; WILLS.	
of high school validating act of 1917, as making valid all acts of boards of education authorized by the general School law.....	11
of deed, as to what is included in indefinite grant of right of way.....	17
intention of parties apparent in deed controls.....	23
ambiguous clause in deed will be construed against the grantor—when court will consider surrounding circumstances in construing deed.....	29
of deed, as to when covenant runs with the land.....	29
of words "and" and "or" in a deed—of deed, as to when remainder to children and their descendants is vested..	58
of sections 93 to 96 of School law, as amended in 1917, for organization of non-high-school districts.....	70
of section 96 of School law, as amended in 1917, as allowing any high school pupil to attend school in most convenient district.....	70
of proviso to section 7 of Wills act, as not being a statute of limitation.....	80
of proviso to section 7 of Wills act, as to whom will can be set aside after one year from probate.....	80
when a statute will be given retroactive effect—words of statute should be given ordinary meaning.....	106

CONSTRUCTION.—*Continued.*

PAGE.

of act of 1917, relating to false checks, as not repealing Confidence Game act.....	113
of section 24 of Compensation act, as to notice of injury..	132
of proviso to section 21 of Compensation act, as not applying to compensation awarded under paragraph (a) of section 7	132
of paragraph (a) of section 7 of Compensation act, as not requiring Industrial Commission to determine shares of beneficiaries	132
of section 67 of Administration act, as not allowing contingent claims	142
of Bulk Sales act of 1913, as applying to the sale of farm implements	199
of act of 1885, authorizing fine for practicing medicine without license, as to meaning of words "first offense" ..	235
of proviso to section 38 of School law of 1889, as applying to any district coming within its description.....	240
School law must be construed as one act—when proviso may operate as substantive enactment.....	241
of provision of section 14 of Ballot law requiring signature of clerk, as being mandatory.....	277
unit of time in law is one day—of Parole act of 1917, as not applying to the crime of conspiracy.....	281
of the Parole act of 1917, as to when prisoner is eligible to parole	281
of words "capital stock," in Foreign Corporations act, as meaning stock authorized by charter.....	289
of rule in <i>Shelley's case</i> , as applying to trust estates—of same rule, as applying to grant to "lawful heirs"....	388
in construing deed written part controls printed matter..	388
of deed, as to when words may be considered surplusage.	389
in construing a statute the legislative intention should be sought and given effect.....	396
of paragraph (d) of section 8 of Workmen's Compensation act	396
of section 15b of Motor Vehicle act, as to what is essence of offense of having car with manufacturer's number changed or erased.....	442
of will, as to intention to devise fee—principal rule in construing wills is to ascertain and give effect to intention of testator	463
of will, as to when devise of fee is limited by subsequent clause—later clause will modify former provision....	463
of the act of 1913, as to what employments must provide wash-rooms	523

CONSTRUCTION.— <i>Continued.</i>	PAGE.
of Public Utilities act, as to its purpose.....	581
meaning of words "the owner," in section 30 of Mechanic's Lien act	589
meaning of word "repair," when used in lease—object of sections 89 and 90 of Torrens act, requiring filing of notice of mechanic's lien.....	590
of provisions of Mechanic's Lien act of 1895, re-enacted in 1903, as remaining in force.....	591
former act will not be repealed by later statute on same subject if both acts can be given effect.....	591
of section 11 of Local Improvement act, requiring publication of improvement ordinance.....	624
of the Mechanic's Lien act, as to what are alterations or repairs	634

CONTRACTS.—See SPECIFIC PERFORMANCE.

a minor may disaffirm or ratify contract within a reasonable time after attaining his majority.....	64
minor cannot defeat ratification of contract by alleging ignorance of right to disaffirm.....	64
crime of confidence game may be committed by use of valid contracts	113
persons dealing with agent of county must know the extent of the agent's authority.....	255
for what services architects may recover under contract with the county.....	255
section 5b of Foreign Corporations act, as amended in 1917, does not impair obligation of contracts.....	289
when existence of contract is question of law—minds of the parties must meet to make a contract.....	470
when contract for importation is complete.....	470
when a freehold is not involved in suit to rescind contract for purchase of land.....	527
contract rights are subject to exercise of police power...	580
when the Public Utilities act does not abrogate an existing contract	581

COVENANTS.—See DEEDS; LEASES.

CONVEYANCES.—See DEEDS.

CORONER'S VERDICT.

coroner's verdict not admissible to establish civil liability..	422
testimony of witnesses taken before coroner's jury is not admissible in a civil suit.....	422

CORPORATIONS.

PAGE.

- section 5*b* of the Foreign Corporations act, as amended in 1917, does not impair obligation of contracts..... 289
- section 5*b* of Foreign Corporations act does not discriminate against foreign corporations..... 289
- when tax on a foreign corporation does not impose burden on inter-State commerce..... 289
- words "capital stock," in Foreign Corporations act, mean stock authorized by charter..... 289

COSTS.

- apportionment of costs where different tenants in common sue for partition in same court..... 451

COUNTIES.

- the duty of building court houses is imposed on boards of supervisors—committee of board of supervisors cannot bind board without authority..... 255
- persons dealing with agent of county must know the extent of the agent's authority..... 255
- for what services architects may recover under contract with the county..... 255
- when county may be compelled to remove building erected during pendency of suit..... 359

COURTS.—See APPEALS AND ERRORS; EQUITY.

CRIMINAL LAW.

- when Supreme Court will not reverse judgment of conviction on evidence 44
- when, only, Supreme Court will interfere on ground that evidence does not support the verdict..... 44
- question of granting a continuance because counsel is engaged in another case rests in discretion of the court.. 113
- when trial should not be indefinitely postponed—when defendant may be convicted under Confidence Game statute when improper evidence volunteered on cross-examination is not reversible error..... 113
- act of 1917, relating to false checks, did not repeal Confidence Game act..... 113
- what constitutes the confidence game—valid contracts may be used 113
- if killing is proved, defendant must prove circumstances in justification 182
- when instruction that calling foul names will not justify attack is proper..... 182

CRIMINAL LAW.—*Continued.*

	PAGE.
certificate of judge is only proper method of showing what took place in his presence.....	182
under act of 1885, authorizing fine for practicing medicine without license, the first offense means first conviction..	235
court not authorized to instruct jury to find defendant not guilty—when child under fourteen years may testify in criminal case	268
defendant cannot complain of error in entertaining a motion to instruct jury to find him not guilty.....	268
what testimony by child's mother is not hearsay—evidence of complaint made by child is competent under counts charging rape	268
when the defendant cannot complain that evidence proves commission of another crime.....	268
when a conviction for conspiracy to obtain property by false pretenses is authorized.....	281
giving numerous instructions on reasonable doubt will not, alone, cause reversal of judgment.....	281
errors not presented to Appellate Court are waived—unit of time, in law, is one day.....	281
Parole act of 1917 does not apply to crime of conspiracy—when a prisoner is eligible to parole under Parole act of 1917	281
co-partners should be indicted as individuals—indictment may join all parties alleged to be guilty of same offense.	310
banking partners may be jointly guilty of receiving deposits while insolvent	310
the word "feloniously" in indictment may be surplusage—when bankers' books may be introduced against them..	310
papers seized from defendant are admissible if otherwise competent	310
the future income from possible improvements is not admissible to prove present value of property.....	310
the court is not required to write instructions—other acts of embezzlement not connected with those charged are not admissible	311
a witness cannot express opinion of solvency of bankers charged with receiving deposits while insolvent.....	311
in a prosecution of bankers the depositors cannot testify that their deposits were lost.....	311
when an instruction as to considering value of surrendered stock should be given.....	311
when statements are inadmissible to corroborate testimony of witness	371

CRIMINAL LAW.—*Continued.*

PAGE.

when alleged stolen articles are admissible in evidence—	
when jury may be allowed to separate during trial.....	371
word “permitted” may be used in an instruction as to right	
of defendant to testify—Supreme Court is not bound to	
search for errors.....	371
instructions may be given as modified, without being re-	
written—indictment constitutes no evidence of guilt...	371
instructions should be read as a series—erasures—when	
judgment of conviction will not be reversed.....	372
a publication may be libelous <i>per se</i> without charging one	
with crime	405
practice of submitting propositions of law is inapplicable	
where criminal case is tried without a jury.....	442
exercise of police power is not unconstitutional because it	
restrains liberty of citizens.....	442
exercise of police power is presumed to be valid—what is	
essence of offense in section 15 <i>b</i> of Motor Vehicle act..	442
statutes punishing wrongdoing without criminal intent are	
valid under the police power.....	442
section 15 <i>b</i> of Motor Vehicle act does not deprive defend-	
ant of property without due process of law.....	443
what must be proved to sustain charge of assault to com-	
mit murder—malice is an essential element to consti-	
tute murder	489
when shooting at a police officer attempting arrest is not	
an assault to commit murder.....	489

CROSS-ERRORS.

when appellee in tax case cannot assign cross-errors.....	486
---	-----

DAMAGES.

damages may be assessed upon dissolution of temporary	
injunction to abate nuisance.....	304
in action for wrongful death, personal service of deceased	
is element of pecuniary loss to next of kin.....	476

DEBTOR AND CREDITOR.

when Bulk Sales act of 1913 applies to sale of farm imple-	
ments—when sheriff is not required to wait ten days be-	
fore levying execution.....	199
levy of execution does not deprive debtor of right to make	
schedule within ten days.....	199

DECREES.—See JUDGMENTS AND DECREES.

DEEDS.

PAGE.

when grantor is estopped to allege that uncertainty of description has rendered deed void.....	16
when rule that occupant claiming under color of title is not limited to land actually possessed does not apply....	16
what is included in indefinite grant of right of way—conveyance of certain number of acres out of larger tract is too indefinite to convey title.....	17
where a deed is recorded there is a presumption of delivery—minors.....	22
when court is justified in finding that scrivener omitted description of tract by mistake.....	22
the intention of the parties apparent in a deed controls in construction.....	23
ambiguous clause will be construed against grantor—when court will consider surrounding circumstances—when a covenant runs with land.....	29
construction of the words “and” and “or”—“descendants” take as purchasers in a grant to “children and their descendants”.....	58
descendants take by way of substitution, only, in a grant to several and their descendants.....	58
when a remainder to children and their descendants is vested.....	58
trustee may convey legal title by sale or devise.....	99
proof that absolute deed is a mortgage must be clear—when grantee is not entitled to be subrogated to benefit of trust deed.....	363
what grantee must show before being entitled to be subrogated to benefit of trust deed.....	363
the rule in <i>Shelley's case</i> must control although contrary to grantor's intention.....	388
the rule in <i>Shelley's case</i> applies to a grant to “lawful heirs”—in construing a deed, the written part controls printed matter.....	388
when words in a deed may be considered as surplusage—what description of heirs may be disregarded in applying rule in <i>Shelley's case</i>	389
void sheriff's deed may be removed as cloud upon title—redemption.....	455
when deed of vacation may be executed—when deed of vacation does not obstruct public highways.....	576

DEFENSES.—See ACTIONS AND DEFENSES.

DELIVERY.—See DEEDS.

DESCENT.

PAGE.

descent of property, whether by inheritance or devise, is controlled by statute..... 80

DISBARMENT.

when failure to exercise good judgment will not disbar—
an attorney should exercise diligence in discharge of
his duties 220
when previous good character should not control decision
of court—public is entitled to high standard of integrity
in legal profession 555
diligence to client does not allow attorney to make a false
affidavit—when filing false affidavit will be ground for
disbarment 615
general charge of reputation for dishonesty may be con-
sidered in connection with specific charges..... 615

DRAINAGE.

a judgment may be collaterally attacked where court is
without jurisdiction—when judgment cannot be collat-
erally attacked 447

EASEMENTS.

the owner of land bordering river has title to center of
stream—owners of land bordering river have easement
for discharge of water from tail-race..... 541

EJECTMENT.

when rule that occupant claiming under color of title is
not limited to land actually possessed does not apply.... 16
right to new trial is confined to trial court—*res judicata*—
only legal title is involved in ejectment—trusts..... 99
equitable title is no bar to recovery in ejectment—defend-
ant who is trespasser cannot set up title in third person. 99
plaintiff in ejectment must recover on strength of his title. 541
proof must correspond with declaration..... 542

ELECTIONS.

when proposition to purchase new high school site is not
properly submitted 240
voters must have opportunity to vote on single question
of authorizing purchase of new school site..... 240
high school board cannot call an election to authorize pur-
chase of building or site except upon petition of voters.. 240
meaning of constitutional requirement that all elections
shall be free and equal..... 241

ELECTIONS.—*Continued.*

PAGE.

requirements of Ballot law are applicable to ballots for voting on hard roads proposition.....	277
provision of section 14 of Ballot law requiring signature of clerk is mandatory.....	277
when mistakes of officers in charge of election are fatal..	277
what vote of the people is required to adopt statute creating a debt	327
newspapers are not privileged to publish libelous matter against candidates for office.....	406
the public may freely comment on conduct of a candidate for office	406
intention to serve public good cannot justify false defamation of private character of candidate for office.....	406

EMPLOYMENT.—See WORKMEN'S COMPENSATION;
MASTER AND SERVANT.

EQUITY.

equity will look to substance of transaction.....	23
when equity has no jurisdiction—the want of jurisdiction of the subject matter cannot be waived.....	35
court sitting in chancery may make up issue at law and call a jury to try it.....	80
when a bill of interpleader cannot be maintained as in the nature of a creditor's bill.....	170
a former adjudication must be pleaded in equity.....	454

ESTOPPEL.

when grantor is estopped to allege that uncertainty of description has rendered deed void.....	16
--	----

EVIDENCE.

evidence in probate court tending to show who drew will is admissible in will contest on issue of undue influence..	91
evidence that chief beneficiary drew will establishes <i>prima facie</i> proof of undue influence in will contest case.....	91
in will contest case, letters of testator are admissible only for purpose of sustaining will.....	91
what is meant by word "think," when used by a witness...	91
when improper evidence volunteered on cross-examination in criminal case is not reversible error.....	113
on motion to instruct for defendant the evidence is to be taken most strongly in favor of plaintiff.....	188
admissions of one devisee as to acts of undue influence not admissible where devisees have separate interests.....	188

EVIDENCE.— <i>Continued.</i>	PAGE.
when attesting witness need not be called in suit to contest will—when testimony as to contents of former will is not admissible	189
right of defendant to make plaintiff his witness on cross-examination rests in discretion of court.....	199
when a child under fourteen years may testify in a criminal case	268
what testimony by child's mother is not hearsay—evidence of complaint made by child is competent under counts charging rape	268
when a defendant cannot complain that evidence proves commission of another crime.....	268
when bankers' books may be introduced against them in criminal case	310
papers seized from defendant in criminal case are admissible if otherwise competent.....	310
future income from possible improvements is not admissible to prove present value of property.....	310
acts of embezzlement not connected with those charged are not admissible.....	311
a witness cannot express opinion of solvency of bankers charged with receiving deposits while insolvent.....	311
in a prosecution of bankers the depositors cannot testify that their deposits were lost.....	311
when testimony as to condition of roof of mine some days before accident is not admissible.....	351
when statements are inadmissible to corroborate testimony of witness—when alleged stolen articles are admissible in evidence	371
when witnesses in civil suit for libel may testify that they understood the libelous article was published concerning the plaintiff	405
when question put to witnesses in libel suit is leading....	405
when books and newspapers are not admissible in civil suit for libel	406
declarations of deceased employee as to how he was injured not admissible in workmen's compensation case...	422
a coroner's verdict is not admissible to establish civil liability—judgment is not admissible against a litigant who was not a party to it.....	422
testimony of witnesses taken before coroner's jury is not admissible in a civil suit.....	422
when former rulings on admissibility of evidence will not be followed	423
who is competent to testify as to amount of solicitors' fees	495

EVIDENCE.—*Continued.*

PAGE.

- rules of evidence apply to hearing before an arbitrator in workmen's compensation case 516
- when court may admit evidence to show what items are lienable, and the amount thereof, in a mechanic's lien proceeding 634

EXECUTORS AND ADMINISTRATORS.—See ADMINISTRATION.

FALSE PRETENSES.

- when a conviction for conspiracy to obtain property by false pretenses is authorized. 281

FEDERAL EMPLOYER'S ACT.—See WORKMEN'S COMPENSATION.

FIDUCIARY RELATIONS.—See WILLS.

FORMER CASES.

- Chidester v. Springfield and Illinois Southeastern Ry. Co.* 59 Ill. 87, explained, as to what is included in indefinite grant of right of way. 17
- Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34, distinguished, as to whether commission is required to determine shares of beneficiaries under Compensation act. . . 132
- People v. Chicago and Eastern Illinois Railroad Co.* 270 Ill. 594, followed, as to when proposition to purchase new high school site is not properly submitted. 240
- People v. McBride*, 234 Ill. 146, followed, as to whether provisions creating debt and levying tax to pay interest must be voted on separately by legislature. 327
- Martens v. Brady*, 264 Ill. 178, followed, in holding act of 1917 for State-wide system of hard roads is not a local or special law. 328
- Hagan v. Varney*, 147 Ill. 281, distinguished, as to whether trust fails where equitable and legal estates are in the same person 388
- People v. Stitt*, 280 Ill. 553, distinguished, as to whether levy of high school tax is invalid after final judgment dissolving district 419
- United States Life Ins. Co. v. Vocke*, 129 Ill. 557, and all subsequent cases in point, overruled, which hold a coroner's verdict admissible to establish civil liability. 422
- People v. Klee*, 282 Ill. 440, followed, as to when levies for county purposes are not sufficiently specific. 486

FORMER CASES.—*Continued.*

PAGE.

<i>Walter Cabinet Co. v. Russell</i> , 250 Ill. 416, followed, as to general rule where the party files pleading after time has expired	494
<i>Public Utilities Com. v. Toledo, St. L. and West. Railroad Co.</i> 286 Ill. 582, followed, as to when finding that rate is too high does not authorize through route and joint rate..	502
<i>City of Chicago v. Noonan</i> , 210 Ill. 18, explained, as to when supplemental assessment proceeding for deficiency may be begun	624

FRAUD.

wife is entitled to protection against foreclosure sale in fraud of her rights.....	561
---	-----

FREEHOLD.

when a freehold is not involved—when freehold is not involved in suit to rescind contract for purchase of land..	527.
--	------

GIFTS.—See CHARITIES.

HIGHWAYS.

requirements of Ballot law are applicable to ballots for voting on hard roads proposition.....	277
act of 1917 for State-wide system of hard roads does not impose burdens on owners of motor vehicles.....	328
act of 1917 for State-wide system of hard roads does not assume debts of counties.....	328
legislature has absolute control over public highways—act of 1917 for State-wide system of hard roads is not local.	328
act of 1917 for State-wide system of hard roads does not delegate legislative or judicial power to department of public works	329
when deed of vacation does not obstruct public highways..	576

HOMESTEAD.

wife is entitled to protection of court against foreclosure sale in fraud of her rights.....	561
when wife does not waive right to complain that property was not sold in separate tracts at foreclosure sale.....	561

INDICTMENTS.

co-partners should be indicted as individuals—indictment may join all parties alleged to be guilty of same offense.	310
word "feloniously," in indictment, may be surplusage....	310
indictment constitutes no evidence of guilt.....	371

INFANTS.—See MINORS.

INJUNCTION.

	PAGE.
when Supreme Court cannot review question whether an injunction was properly dissolved.....	304
damages may be assessed upon dissolution of temporary injunction to abate nuisance.....	304
when county may be compelled to remove building erected during pendency of suit.....	359

INJURIES.—See NEGLIGENCE; WORKMEN'S COMPENSATION.

INSANE PERSONS.

when a valid trust is created for care of insane person—court is not authorized to make election for insane heir and devisee unless clearly for his best interests.....	568
---	-----

INSTRUCTIONS.

when instruction that calling foul names will not justify attack is proper in murder trial.....	182
on motion to instruct for defendant the evidence is to be taken most strongly in favor of plaintiff.....	188
court not authorized to instruct jury to find defendant not guilty in criminal case.....	268
giving numerous instructions on reasonable doubt will not, alone, cause reversal of judgment of conviction.....	281
court is not required to write instructions—when instruction as to considering value of surrendered stock should be given in case against insolvent bankers.....	311
word "permitted" may be used in instruction as to right of defendant to testify in criminal case.....	371
instructions may be given as modified without being rewritten.....	371
instructions should be read as a series—erasures.....	372
instructions should be read as a series—when it is not error to give instruction referring to declaration.....	476

INTER-STATE COMMERCE.—See RAILROADS.

when tax on foreign corporation does not impose burden on inter-State commerce.....	289
---	-----

JUDGMENTS AND DECREES.

when sheriff is not required to wait ten days before levying execution.....	199
levy of execution does not deprive debtor of right to make schedule within ten days.....	199

JUDGMENTS AND DECREES.— <i>Continued.</i>	PAGE.
judgment will not be reversed for matter of form.....	235
a judgment is not admissible against a litigant who was not a party to it.....	422
a judgment in drainage proceeding may be collaterally attacked where court is without jurisdiction—when judgment cannot be collaterally attacked.....	447
error in decree for foreclosure can be corrected only in direct proceeding—former adjudication must be pleaded in equity	454
rule as to when judgment must exceed \$1000 to be reviewable on <i>certiorari</i>	634

JUDICIAL NOTICE.

when fact that court has judicial notice will not charge individuals with the same knowledge.....	454
---	-----

JUDICIAL SALES.

if possible, only such property will be sold as is necessary to discharge lien	561
chancellor has discretion in approving master's sale subject to decree.....	561

JURIES.—See TRIAL.

JURISDICTION.

when equity has no jurisdiction—want of jurisdiction of subject matter cannot be waived.....	35
a judgment in drainage proceeding may be collaterally attacked where court is without jurisdiction.....	447
jurisdiction of subject matter does not depend on correctness of decision rendered.....	447
jurisdiction of Supreme Court to review mechanic's lien proceeding	634

LACHES.

<i>laches</i> cannot be charged against owner in possession of realty for failure to remove cloud.....	454
--	-----

LARCENY.

when alleged stolen articles are admissible in evidence....	371
---	-----

LEASES.

claim for expenses of administration of estate is not consistent with claim of lien for installments of rent arising out of lease to deceased.....	142
--	-----

LEASES.—*Continued.*

PAGE.

when claim against estate for future installments of rent is contingent	142
suit for installments of rent not allowable as claim against estate may be brought against representative or heirs of deceased	143
what description in lease is not sufficient to create lien for rent on after acquired property of lessee.....	143
property of assignee of lessee cannot be pledged for rent by mere assignment of lease.....	143
a covenant creating lien for rent does not run with land..	143
meaning of word "repair," when used in lease—interest of lessor in building cannot be subjected to mechanic's lien for unauthorized alterations by lessee.....	590
when fixtures are permanent.....	634
owner who permits lessee to improve property is subject to Mechanic's Lien act.....	635

LIBEL.

two separate libels cannot be joined in one count of declaration—the plea of justification should be as broad as the charge	405
a publication may be libelous <i>per se</i> without charging a crime—what questions are for jury.....	405
what defense is admissible under the general issue—when question as to truth of article published is leading.....	405
when witnesses may testify that they understood a libelous article was published concerning the plaintiff.....	405
when books and newspapers are not admissible—truth is a defense only when published with good motives and for justifiable ends	406
newspapers are not privileged to publish libelous matter against candidates for office.....	406
public may freely comment on conduct of a candidate for office—what matters are not a defense but go only in mitigation of damages.....	406
intention to serve public good cannot justify false defamation of private character of candidate for office.....	406
in the same plea matters of mitigation should not be mixed with matters of justification.....	406

LICENSES.

under act of 1885, authorizing fine for practicing medicine without license, first offense means first conviction.....	235
act of 1885, providing for examination for license to practice medicine, is not invalid.....	235

LIENS.—See MECHANICS' LIENS.**PAGE.**

description in a chattel mortgage must be sufficiently specific to identify property.....	143
what description in lease is not sufficient to create lien for rent on after acquired property of lessee.....	143
no lien attaches to tax certificates for unpaid taxes—tax collector can enforce collection of taxes only by lien of his warrant	170

LIMITATIONS.

proviso to section 7 of the Wills act is not a statute of limitation	80
when liens are not barred by Statute of Limitations.....	590

LOCAL IMPROVEMENTS.—See SPÉCIAL ASSESSMENTS.**MASTER AND SERVANT.—See WORKMEN'S COMPENSATION.**

act of 1913 to provide wash-rooms in certain employments is valid as a police regulation.....	523
what employments must provide wash-rooms under the act of 1913	523
what evidence sufficient to render a place of employment subject to act of 1913 for providing wash-rooms.....	523
when evidence does not show wash-rooms are required in round-house and machine shop.....	523

MECHANICS' LIENS.

meaning of words "the owner," in section 30 of Mechanic's Lien act—who must be made parties to a bill for general settlement	589
who may file intervening petition or cross-bill to bill for general settlement—burden is on the lienors to establish right to lien	589
when owner submits to jurisdiction of court—when liens are not barred by Statute of Limitations.....	590
meaning of word "repair," when used in lease—interest of lessor in building cannot be subjected to lien for unauthorized alterations by lessee.....	590
object of sections 89 and 90 of Torrens act, requiring filing of notice of lien.....	590
rule as to filing claim for mechanic's lien where Torrens law is in force.....	590
provisions of the Mechanic's Lien act of 1895, re-enacted in 1903, have remained in force.....	591

MECHANICS' LIENS.—*Continued.*

PAGE.

jurisdiction of Supreme Court to review mechanic's lien proceeding—when fixtures are permanent.....	634
when court may admit evidence to show what items are lienable and amount thereof—what are alterations or repairs within meaning of Lien act.....	634
what rules for determining fixtures apply to lienor and lienee—owner who permits lessee to improve property is subject to Lien act.....	635

MEDICINE AND SURGERY.

under act of 1885, authorizing fine for practicing without license, the first offense means the first conviction.....	235
the legislature may define "practicing medicine" so as to include chiropractice	235
act of 1885, providing for examination for license to practice medicine, is not invalid.....	235
the legislature is sole judge of what laws are necessary for protection of public health.....	235

MINES.

fact that dangerous condition was not marked does not conclusively show failure to comply with Mining act...	351
statute contemplates a sufficient examination to discover dangerous conditions	351
when testimony as to condition of roof some days before accident is not admissible—when proposition of law is properly refused	351

MINORS.

recording of deed by grantor creates a presumption of delivery although grantee is a minor.....	22
a minor may disaffirm or ratify contract within a reasonable time after attaining his majority.....	64
a minor cannot defeat ratification of contract by alleging ignorance of right to disaffirm.....	64
after one year from probate a will can be set aside only as to interests of persons under disability.....	80
the Workmen's Compensation act does not apply to minors who are illegally employed.....	347

MISTAKE.

when court is justified in finding that scrivener of deed omitted description of tract by mistake.....	22
when mistakes of officers in charge of election are fatal..	277

MORTGAGES.

PAGE.

presumption of existence of a mortgage from certificate of notary is not overcome except by clear proof.....	23
what is proof of intention to release mortgage—equity will look to substance of transaction.....	23
description in a chattel mortgage must be sufficiently specific to identify property.....	143
proof that absolute deed is a mortgage must be clear—when grantee is not entitled to be subrogated to benefit of trust deed.....	363
what grantee must show before being entitled to be subrogated to benefit of trust deed.....	363
error in a decree for foreclosure can be corrected only in direct proceeding	454
void sheriff's deed may be removed as cloud—redemption.....	455
when court may set aside sale of property <i>en masse</i>	561
wife is entitled to protection of court against foreclosure sale in fraud of her rights.....	561
when a wife does not waive right to complain that property was not sold in separate tracts.....	561
if possible, only such property will be sold on foreclosure as is necessary to discharge lien.....	561
chancellor has discretion in approving master's sale subject to decree.....	561

MURDER.

if killing is proved, defendant must prove circumstances in justification	182
when instruction that calling foul names will not justify attack is proper.....	182
malice is an essential element to constitute murder.....	489

NEGLIGENCE.—See WORKMEN'S COMPENSATION.

fact that dangerous condition in a mine was not marked does not conclusively show failure to comply with the Mining act	351
Mining act contemplates sufficient examination to discover dangerous conditions	351
when testimony as to condition of roof of mine some days before accident is not admissible—when proposition of law is properly refused.....	351
what questions are for the jury—controverted questions of fact are settled by verdict of jury and judgment of the Appellate Court	476
personal service of deceased is element of pecuniary loss to next of kin.....	476

NEGLIGENCE.—*Continued.*

PAGE.

when it is not error to give an instruction referring to the declaration	476
owner must take precautions to protect children playing with attractive device on premises	506
plaintiff must prove ordinary care by parents with respect to child going to dangerous locality	506
what must be shown to render a negligent act the proximate cause of injury	507

NEGOTIABLE INSTRUMENTS.—See **BILLS AND NOTES.**

NEW TRIAL.

right to new trial in ejectment is confined to trial court . . .	99
--	----

NOTICE.

defendant is entitled to definite notice in summons where he is to appear	454
when it is not material whether trial court violated its rules in not requiring notice before striking answer . . .	494

NUISANCES.

damages may be assessed upon dissolution of temporary injunction to abate nuisance	304
--	-----

PARENT AND CHILD.

plaintiff suing for wrongful death of child must prove ordinary care by parents with respect to child going to dangerous locality	506
---	-----

PAROLE.—See **CRIMINAL LAW.**

PARTIES.

who must be made parties to a bill for general settlement under Mechanic's Lien act	589
when owner submits to jurisdiction of court under Mechanic's Lien act	590

PARTITION.

pleas in abatement cannot be pleaded in a partition suit—costs	451
--	-----

PARTNERSHIPS.

co-partners should be indicted as individuals—banking partners may be jointly guilty of receiving deposits while insolvent	310
--	-----

PARTNERSHIPS.—*Continued.*

PAGE.

- claim against partners under Workmen's Compensation act
and award against firm will bind individual partners... 342
- a partnership is not a legal entity..... 342

PENSIONS.

- amendment to section 3 of the Police Pension Fund act is
retroactive but is not invalid..... 106
- right to claim police pension may be taken away by State.. 106

PLATS.

- when deed of vacation may be executed—when deed of
vacation does not obstruct public highways..... 576

PLEADING.—See INDICTMENTS.

- when bill of interpleader cannot be maintained as in the
nature of a creditor's bill..... 170
- practice where necessary party files a disclaimer..... 171
- two separate libels cannot be joined in one count of dec-
laration—plea of justification in libel should be as broad
as the charge..... 405
- what defense is admissible under the general issue..... 405
- in the same plea matters in mitigation of damages should
not be mixed with matters of justification..... 406
- pleas in abatement cannot be pleaded in a partition suit... 451
- a former adjudication must be pleaded in equity..... 454
- general rule where party files pleading after time has ex-
pired—general rule as to time for filing pleadings..... 494
- parties asking for extension of time to plead should show
good reason therefor..... 494
- discretion of court in setting aside default judgment or
giving time to plead is not reviewable except for abuse.. 494
- when it is not material whether the trial court violated its
rules in not requiring notice before striking answer.... 494
- who must be made parties to a bill for general settlement
under Mechanic's Lien act..... 589
- who may file intervening petition or cross-bill to bill for
general settlement under Mechanic's Lien act..... 589

POLICE.—See PENSIONS.

POLICE POWER.

- the legislature is sole judge of what laws are necessary
for protection of public health..... 235
- exercise of police power must be reasonably necessary to
accomplish legitimate object..... 236

POLICE POWER.—*Continued.*

PAGE.

legislature cannot invest administrative board with arbitrary power over rights of citizens.....	236
exercise of police power is not unconstitutional because it restrains liberty of citizens—exercise of police power is presumed to be valid.....	442
statutes punishing wrongdoing without criminal intent are valid under the police power.....	442
act of 1913 to provide wash-rooms in certain employments is valid as a police regulation.....	523
property rights are subject to exercise of police power—exercise of the police power must be necessary and reasonable	580
contract rights are subject to exercise of police power—what is measure of reasonableness of police regulation..	580
what conduct is not subject to the police power—extent to which business of public utility may be regulated under police power	580

POWERS.

a collateral power cannot be suspended or extinguished by donee—what is a power in gross.....	434
what is power appendant or appurtenant—power in gross, if not coupled with trust, may be extinguished by donee.	434
power appendant or appurtenant may be released or extinguished—when power to appoint a fee is extinguished by donee	434

PRACTICE.

court sitting in chancery may make up issue at law and call a jury to try it.....	80
when objection to manner in which issue at law in a will contest case is submitted is waived on appeal.....	80
question of granting continuance of criminal case because counsel is engaged in another prosecution rests in discretion of the court.....	113
when trial of a criminal case should not be indefinitely postponed	113
practice where necessary party files a disclaimer.....	171
certificate of judge is only proper method of showing what took place in his presence.....	182
right of defendant to make plaintiff his witness on cross-examination rests in discretion of court.....	199
judgment will not be reversed for matter of form.....	235
court not authorized to instruct jury to find defendant not guilty in criminal case.....	268

PRACTICE.—*Continued.*

PAGE.

defendant cannot complain of error in entertaining a motion to instruct jury to find him not guilty.....	268
practice of submitting propositions of law is inapplicable where criminal case is tried without a jury.....	442
counsel must base argument in Supreme Court on matters found in record—general rule where party files pleading after time has expired.....	494
general rule as to time for filing pleadings—rules of practice should not impede administration of justice.....	494
parties asking for extension of time to plead should show good reason therefor.....	494
discretion of court in setting aside default judgment or giving time to plead is not reviewable except for abuse....	494
when it is not material whether the trial court violated its rules in not requiring notice before striking answer....	494
effect where bill of exceptions is stricken from files.....	574
rule as to when judgment must exceed \$1000 to be reviewable on <i>certiorari</i>	634

PRESUMPTIONS.

recording of deed creates presumption of delivery—minors	22
presumption of existence of a mortgage from certificate of notary is not overcome except by clear proof.....	23
exercise of police power is presumed to be valid.....	442

PRINCIPAL AND AGENT.

persons dealing with agent of county must know the extent of the agent's authority.....	255
---	-----

PROBATE.—See WILLS.

PROCESS.

defendant is entitled to definite notice in summons where he is to appear.....	454
--	-----

PUBLIC UTILITIES.

what must be shown before commission can establish a through route and joint rate.....	502
when finding that rate is too high does not authorize establishing a through route and joint rate.....	502
extent to which business of a public utility may be regulated under police power.....	580
purpose of Public Utilities act—when Public Utilities act does not abrogate existing contract.....	581

RAILROADS.

PAGE.

what is included in indefinite grant of right of way.....	17
when a locomotive boiler-washer is not engaged in inter-State commerce	126
State may tax money on hand April 1, 1918, received from operation of railroads under Federal control.....	159
what must be shown before Public Utilities Commission can establish a through route and joint rate.....	502
when finding that rate is too high does not authorize establishing a through route and joint rate.....	502
owner must take precautions to protect children playing with attractive device on premises.....	506
when evidence does not show wash-rooms are required in round-house and machine shop.....	523
an employee engaged in inter-State commerce is not subject to State Compensation act.....	603
injury in inter-State commerce is within Federal Employer's Liability act, regardless of who causes it.....	603
when injury to flagman at public crossing occurs in inter-State commerce	604

RAPE.

evidence of complaint made by a child to her mother is competent	268
--	-----

RATIFICATION.—See CONTRACTS.

REAL PROPERTY.—See DEEDS; WILLS; EJECTMENT.

REGISTRATION OF TITLE.

object of sections 89 and 90 of the Torrens act, requiring filing of notice of mechanic's lien.....	590
rule as to filing claim for mechanic's lien where Torrens law is in force.....	590
object of Torrens system of registration.....	591

REMEDIES.—See ACTIONS AND DEFENSES.

RES JUDICATA.

right to new trial in ejectment is confined to trial court... 99	
a former adjudication must be pleaded in equity.....	454

REVENUE.—See TAXES.

ROADS AND BRIDGES.—See HIGHWAYS.

SALES.

PAGE.

- when the Bulk Sales act of 1913 applies to sale of farm implements 199

SCHOOLS.

- there is no constitutional limitation as to agencies State shall adopt in providing free schools—the validating act of 1917 is valid. 11
- validating act of 1917 makes valid all acts of boards of education authorized by general School law. 11
- when school board is not engaged in hazardous occupation under Workmen's Compensation act. 41
- when janitor of school house is not engaged in employment connected with school building. 41
- purpose of sections 93 to 96 of School law, as amended in 1917, for the organization of a non-high-school district.. 70
- under section 96 of the School law any high school pupil may attend school in most convenient district. 70
- non-high-school district boards exercise jurisdiction separate from other high school boards. 70
- no limitation is placed on legislature with reference to formation of school districts and their power to tax... 70
- sections 93 to 96, inclusive, of School law, as amended in 1917, are not invalid. 71
- when proposition to purchase new high school site is not properly submitted 240
- voters must have opportunity to vote on single question of authorizing purchase of new school site. 240
- power of high school board in selection of school site. . . . 240
- proviso to section 38 of School law of 1889 applies to any district coming within its description. 240
- high school board cannot call an election to authorize purchase of building or site except upon petition of voters.. 240
- School law must be construed as one act. 241
- when a county may be compelled to remove jail erected near school 359
- levy of high school tax is invalid after final judgment dissolving district 419

SOLICITORS' FEES.

- who is competent to testify as to amount of fees. 495

SPECIAL ASSESSMENTS.

- introduction of formal proof makes *prima facie* case for petitioner—time when a supplemental proceeding for deficiency may be begun. 624

SPECIAL ASSESSMENTS.—*Continued.*

PAGE

- petition purporting to be signed by village attorney *prima facie* complies with statute..... 624
- when section 11 of Local Improvement act, requiring publication of ordinance, must be complied with..... 624
- when a public hearing must be had on supplemental proceeding..... 624

SPECIFIC PERFORMANCE.

- right to specific performance rests in discretion of court, subject to principles of equity..... 537
- contract to convey may be enforced although inconvenient to grantors—performance may be enforced where beneficial owner contracts to convey..... 537

STARE DECISIS.

- when former rulings on admissibility of evidence will not be followed..... 423

STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTRUCTION; CONSTITUTIONAL LAW.

- when a statute will be given retroactive effect—the words should be given ordinary meaning—statute cannot deprive citizen of vested right..... 106
- when proviso may operate as a substantive enactment—the General Assembly cannot bind its successor as to the method of repealing an act..... 241
- publication of statute creating a debt may be provided for in act itself—what vote of people is required to adopt statute creating a debt..... 327
- creation of debt and levy of tax to pay interest may be included in one act..... 327
- provisions necessary to carry out purpose of act need not be expressed in title..... 328
- former act will not be repealed by later statute on same subject if both acts can be given effect..... 591

SUBROGATION.—See MORTGAGES.

TAXES.

- when questions cannot be considered on an appeal from a judgment for taxes..... 70
- no limitation is placed on the legislature with reference to formation of school districts and their power to tax.... 70

TAXES.—*Continued.*

PAGE.

State may tax money on hand April 1, 1918, received from operation of railroads under Federal control.....	159
when question of revenue is involved on appeal—no lien attaches to tax certificates for unpaid taxes.....	170
tax collector can enforce collection of taxes only by lien of his warrant.....	170
when a bill of interpleader cannot be maintained as in the nature of a creditor's bill.....	170
when tax on foreign corporation does not impose burden on inter-State commerce.....	289
creation of a debt and levy of tax to pay interest may be included in one act of legislature.....	327
provisions creating debt and levying tax to pay interest need not be voted on separately by legislature.....	327
in specifying objects of appropriation by legislature various items of expense need not be stated.....	328
levy of high school tax is invalid after final judgment dissolving district	419
when levies for county purposes are not sufficiently specific—when the appellee in a tax case cannot assign cross-errors	486

TRIAL.

on motion to instruct for defendant the evidence is to be taken most strongly in favor of plaintiff.....	188
what question is presented on motion to withdraw issue from jury in will contest case.....	188
when jury may be allowed to separate during trial.....	371
presents should not be given to or received by juror.....	406
jurors should not be allowed to read newspaper comments on the trial.....	407

TRUST DEEDS.—See MORTGAGES.

TRUSTS.

payment of consideration cannot be shown to establish a trust in an ejectment proceeding.....	99
equitable title is no bar to recovery in ejectment—trustee may convey legal title by sale or devise.....	99
charitable uses are not within rule against perpetuities—when devise is to charitable uses.....	229
trust will fail where equitable and legal estates are in same person—rule in <i>Shelley's case</i> applies to trust estates....	388
when a valid trust is created by will for care of an insane person	568

UNDUE INFLUENCE.—See WILLS.

VENUE.

PAGE.

defendant is entitled to definite notice in summons where
he is to appear..... 454

WAIVER.

want of jurisdiction of the subject matter of a bill cannot
be waived 35
when objection to manner in which issue at law in a will
contest case is submitted is waived on appeal..... 80
errors not presented to Appellate Court are waived..... 281
when a wife does not waive right to complain that prop-
erty was not sold in separate tracts at foreclosure sale.. 561

WATERS.

an owner of land bordering river has title to center of
stream—owners of land bordering river have easement
for discharge of water from tail-race..... 541
fact that a stream was meandered by governmental sur-
veyors tends to show it was a river channel..... 541

WILLS.

descent of property, whether by inheritance or devise, is
controlled by statute..... 80
right to contest a will is statutory—proviso to section 7
of Wills Act is not a statute of limitation..... 80
after one year from probate a will can be set aside only as
to interests of persons under disability..... 80
when objection to manner in which issue at law in a will
contest case is submitted is waived on appeal..... 80
when devise is of a fee simple—when devise will lapse—
the re-publication of a will by a codicil does not revive
lapsed devise 49
when a devise will be sustained by implication—a devise
by implication cannot rest upon conjecture..... 49
if possible, a lapsed legacy or devise will sink into residu-
ary clause 49
particular mode of expression not necessary to constitute
residuary clause—a residuary clause should be construed
to prevent intestacy..... 49
evidence in probate court tending to show who drew will
is admissible in will contest on issue of undue influence.. 91
evidence that chief beneficiary drew will establishes *prima*
facie proof of undue influence..... 91

WILLS.—*Continued.*

PAGE.

when a confidential or fiduciary relation arises—letters of the testator are admissible only for purpose of sustaining will	91
trustee may convey legal title by sale or devise.....	99
what is undue influence—burden is on the contestant to prove charge of undue influence—fiduciary relation....	188
what question is presented on motion to withdraw issue from jury	188
admissions of one devisee as to acts of undue influence are not admissible where devisees have separate interests..	188
when interests of devisees are not joint—when error in holding court at home of a witness is harmless.....	189
when attesting witness need not be called in suit to contest will—when testimony as to contents of former will is not admissible	189
charitable uses are not within rule against perpetuities—gifts to charity are favored—when devise is to charitable uses	229
a collateral power cannot be suspended or extinguished by donee—what is a power in gross.....	434
what is power appendant or appurtenant—power in gross, if not coupled with trust, may be extinguished by donee.	434
power appendant or appurtenant may be released or extinguished—when power to appoint fee is extinguished by donee	434
simple devise of land will convey fee unless contrary intent is shown—any part of will may show intention to limit fee devised	463
principal rule of construction is to ascertain and give effect to intention of testator.....	463
later clause will modify former provision—when devise of fee is limited by subsequent clause.....	463
when bequest for perpetual care of burial lots violates the rule against perpetuities.....	568
when county court may control amount to be spent under bequest for markers for graves—when a valid trust is created for care of insane person.....	568
court is not authorized to make election for insane heir and devisee unless clearly for his best interests.....	568

WITNESSES.—See EVIDENCE.

WORDS AND PHRASES.

construction of the words “and” and “or” in a deed—“descendants” take as purchasers in grant to “children and their descendants”	58
--	----

WORDS AND PHRASES.—*Continued.*

PAGE.

what is meant by word "think," when used by a witness...	91
under act of 1885, authorizing fine for practicing medicine without license, "first offense" means first conviction...	235
the legislature may define "practicing medicine" so as to include chiropractice	235
words "capital stock," in Foreign Corporations act, mean stock authorized by charter.....	289
word "feloniously," in indictment, may be surplusage...	310
word "permitted" may be used in instruction as to right of defendant to testify in criminal case.....	371
rule in <i>Shelley's case</i> applies to grant to "lawful heirs"...	388
meaning of words "the owner," in section 30 of Mechanic's Lien act	589
meaning of word "repair," when used in lease.....	590

WORKMEN'S COMPENSATION.

notice of the accident is jurisdictional.....	39
when school board is not engaged in hazardous occupation under paragraph 8 of section 3 of Compensation act....	41
when janitor of school house is not engaged in employment connected with school building.....	41
circuit court may review decision of arbitrator although no application is made for review by commission.....	87
accidental injury necessary before compensation can be awarded for death of an employee having pre-existing disease	87
when death is not from accidental injury.....	87
when shooting of an employee arises out of employment—when locomotive boiler-washer is not engaged in interstate commerce	126
finding of a fact sustained by competent evidence cannot be reviewed	132
section 24 of Compensation act, as to notice of injury, is complied with by notice to the foreman.....	132
a proviso to section 21 does not apply to compensation awarded under paragraph (a) of section 7 of the Compensation act	132
Industrial Commission is not required to determine shares of beneficiaries under paragraph (a) of section 7 of the Compensation act	132
when sum for medical services should not be included in an award	133
when occupation at time of injury determines whether parties are under the Compensation act.....	163

WORKMEN'S COMPENSATION.— <i>Continued.</i>	PAGE.
purpose of the Compensation act in specifying hazardous occupations—when an employee is not engaged in hazardous occupation	163
inference that injury arose out of employment must be based on evidence—burden of proof.....	206
when there is no evidence that an accident arose out of employment	206
when death results from injury and not from an intervening cause	262
employer who denies liability cannot, after award is made, elect to pay compensation to deceased's beneficiaries. . .	263
when Industrial Commission is not required to declare proportion of award to each of beneficiaries.....	263
when an injury arises out of employment—claim for compensation may be made orally by attorney.....	342
claim against partners and award against the firm will bind individual partners	342
the Compensation act does not apply to minors who are illegally employed	347
purpose of paragraph (d) of section 8 of the Compensation act	395
paragraph (d) of section 8 of Compensation act cannot apply where employee makes no claim and does not return to work within six months.....	396
injured employee may claim benefit of paragraph (d) of section 8 of the Compensation act although discharged within eighteen months after returning to work.....	396
paragraph (d) of section 8 of Compensation act does not deny equal protection of the law.....	396
the circuit court, on review by <i>certiorari</i> , cannot enter a money judgment and order execution.....	397
declarations of a deceased employee as to how he was injured are not admissible.....	422
jurisdiction of courts of review under Compensation act..	422
injury need not have been foreseen or expected to arise out of employment.....	516
when an injury while defending employer's business arises out of employment.....	516
when it is duty of employee to save the lives of his fellow-workmen—when assault arises out of employment....	516
rules of evidence apply to hearing before arbitrator—proceedings under Compensation act are statutory.....	516
circuit court cannot enter money judgment for compensation and order execution.....	516

WORKMEN'S COMPENSATION.—*Continued.*

PAGE.

evidence may be reviewed to determine jurisdiction of commission—what is presumptive evidence of filing notice of election to operate under Compensation act.....	532
when commission must determine persons entitled to compensation for death of an employee.....	532
an employee engaged in inter-State commerce is not subject to State Compensation act.....	603
injury in inter-State commerce is within Federal Employer's Liability act, regardless of who causes it.....	603
when injury to flagman at public crossing occurs in inter-State commerce	604

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR
EXPLAINED IN THIS VOLUME.

A	PAGE.
Abbott v. Anderson, 265 Ill. 285.....	346
Adams v. Larson, 279 Ill. 268.....	540
Aetitus v. Spring Valley Coal Co. 246 Ill. 32.....	355
Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406.....	394
Ætna Life Ins. Co. v. Milward, (Ky.) 68 L. R. A. 285.....	432
Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179.....	429, 136
Alley v. Adams County, 76 Ill. 101.....	181
Allott v. American Strawboard Co. 267 Ill. 272.....	545, 543
Alton, City of, v. Illinois Transportation Co. 12 Ill. 38.....	33
American Car Co. v. Armentraut, 214 Ill. 509.....	445
American Milling Co. v. Industrial Board, 279 Ill. 560.....	218
American Mortgage Co. v. Wright, 101 Ala. 658.....	69
American Smelting and Refining Co. v. Colorado, 204 U. S. 103.	296
Anderson v. Anderson, 251 Ill. 415.....	540
Anderson v. Gray, 134 Ill. 550.....	105
Anderson v. Soward, 40 Ohio St. 325.....	69
Anderson Transfer Co. v. Fuller, 174 Ill. 221.....	500
Andrews v. Andrews, 110 Ill. 223.....	232
Andrews v. Board of Supervisors, 70 Ill. 65.....	260
Armour & Co. v. Industrial Board, 273 Ill. 590.....	430, 429

B	
Bailey v. Industrial Com. 286 Ill. 623.....	265
Bails v. Davis, 241 Ill. 536.....	394
Baker v. Baker, 202 Ill. 595.....	96
Baker v. Hall, 214 Ill. 364.....	26
Baldwin Tool Works v. Blue, 240 Fed. Rep. 202.....	303
Ball v. Evening American Publishing Co. 237 Ill. 592.....	413

	PAGE.
Baltimore and Ohio Southwestern Ry. Co. v. Then, 159 Ill. 535.	483
Bates v. Gillett, 132 Ill. 287.	62
Bauchens v. Davis, 229 Ill. 557.	191
Bean v. People, 124 Ill. 576.	286
Beckwith v. People, 26 Ill. 500.	493
Belding v. Reed, 3 Hurl. & Colt. 955.	152
Belote v. White, 2 Head, 703.	84
Bennett v. Bennett, 217 Ill. 434.	393
Bennitt v. Wilmington Star Mining Co. 119 Ill. 9.	595
Bergan v. Cahill, 55 Ill. 160.	468
Bestor v. Hickey, 71 Conn. 181.	69
Big Muddy Coal Co. v. Industrial Board, 279 Ill. 235.	136
Bigoness v. Hibbard, 267 Ill. 301.	566
Bishop v. O'Conner, 69 Ill. 431.	368
Bland v. Bland, 103 Ill. 11.	466
Board of Education v. Carolan, 182 Ill. 119.	249
Boehme v. Sovereign Camp, 98 Tex. 376.	433
Borden v. Croak, 131 Ill. 68.	153, 151
Borders v. Hodges, 154 Ill. 498.	368
Bouton v. Board of Supervisors, 84 Ill. 384.	260
Bowden v. Bowden, 75 Ill. 111.	237
Bowen v. John, 201 Ill. 292.	465
Bowles v. Bryan, 254 Ill. 148.	191
Boyd v. Boyd, 163 Ill. 611.	461
Boyd v. Strahan, 36 Ill. 355.	466
Boyle v. Boyle, 158 Ill. 228.	193
Bradish v. Yocum, 130 Ill. 386.	28
Bradley v. Lightcap, 201 Ill. 511.	101
Bradsby v. Wallace, 202 Ill. 239.	467
Brooklyn, Village of, v. Smith, 104 Ill. 429.	550
Brush v. City of Carbondale, 229 Ill. 144.	473
Bryant v. Fissel, 84 N. J. L. 72.	130
Buckmaster v. Carlin, 3 Scam. 104.	450
Burbach v. Burbach, 217 Ill. 547.	391
Burdick v. People, 149 Ill. 600.	446
Burke v. Burke, 259 Ill. 262.	573
Burt v. Wigglesworth, 117 Mass. 303.	316
Bushnell v. Industrial Board, 276 Ill. 262.	41
Butler v. Huestis, 68 Ill. 594.	395

C

Campbell v. Campbell, 138 Ill. 612.	195, 193
Campbell v. Colorado Coal and Iron Co. 9 Colo. 60.	346
Campbell v. Jameson, 8 Pa. St. 498.	55

	PAGE.
Campbell v. People, 159 Ill. 9.....	385
Carlin v. Peerless Gas Light Co. 283 Ill. 142.....	82
Carlyle, City of, v. Carlyle Light and Power Co. 140 Ill. 445..	500
Carpenter v. Hubbard, 263 Ill. 571.....	394
Casey v. Kimmel, 181 Ill. 154.....	105
Castle v. Houston, (Kan.) 27 Am. Rep. 127.....	416
Castle v. Judson, 17 Ill. 381.....	499, 498
Catlett v. Young, 143 Ill. 74.....	354
Central Garage v. Industrial Com. 286 Ill. 291.....	210
Cervený v. Chicago Daily News Co. 139 Ill. 345.....	413
Chambers v. Modern Woodmen, 18 S. Dak. 173.....	433
Chapin v. Billings, 91 Ill. 539.....	104
Chicago and Alton R. R. Co. v. Industrial Board, 274 Ill. 336..	425
Chicago Anderson Brick Co. v. Chicago, 138 Ill. 628....	579, 578
Chicago, City of, v. Keefe, 114 Ill. 222.....	483
Chicago, City of, v. Noonan, 210 Ill. 18.....	631
Chicago Hair and Bristle Co. v. Mueller, 203 Ill. 558.....	515
Chicago, Rock Island and Pac. Ry. Co. v. People, 222 Ill. 427..	550
Chicago Title and Trust Co. v. Storage Co. 260 Ill. 485.....	431
Chicago, Wilmington and Ver. Coal Co. v. People, 214 Ill. 421.	444
Chidester v. Springfield and Ill. Southeast. Ry. Co. 59 Ill. 87..	21
Chilson v. People, 224 Ill. 535.....	124
Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148.....	103
Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9.....	340
Clark v. People, 146 Ill. 348.....	450
Clark v. VanCourt, 100 Ind. 113.....	69
Cleve., Cin., Chi. and St. L. Ry. Co. v. Polecat Dist. 213 Ill. 83.	449
Cobb Chocolate Co. v. Knudson, 207 Ill. 452.....	383
Coe v. Maryland Ry. Co. 31 N. J. Eq. 105.....	368
Coe v. Moon, 260 Ill. 76.....	68, 67
Coles County v. Goehring, 209 Ill. 142.....	260
Comfort v. Mather, 2 Watts & S. 450.....	55
Commonwealth v. Ensign, 228 Pa. 400.....	315
Commonwealth v. Mixer, 207 Mass. 141.....	446
Commonwealth v. Philpot, 130 Mass. 59.....	314
Condon v. Brockway, 157 Ill. 90.....	119
Connor v. Gardner, 230 Ill. 258.....	56
Consumers Co. v. City of Chicago, 268 Ill. 113.....	578
Cook v. Big Muddy-Carterville Mining Co. 249 Ill. 41.....	356
Cook v. Forest, 18 Ill. 581.....	499, 498
Cox v. Royal Tribe, 42 Ore. 365.....	433
Creighton v. Roe, 218 Ill. 619.....	26
Crerar v. Williams, 145 Ill. 625.....	467, 232
Croker v. Williamson, 208 N. Y. 480.....	84

	PAGE.
Cronk v. People, 131 Ill. 56.....	274
Crumbaugh v. Owen, 238 Ill. 497.....	98
Culver v. Hide and Leather Bank, 78 Ill. 625.....	500
Cumberledge v. Brooks, 235 Ill. 249.....	540

D

Daly v. Wilkie, 111 Ill. 382.....	468
Davenport and R. I. Bridge Ry. Co. v. Johnson, 188 Ill. 472..	550
Davidson v. Young, 38 Ill. 145.....	67
Davis v. Davis, 62 Ohio St. 411.....	58
Davis v. Illinois Collieries Co. 232 Ill. 284.....	354
Davis v. Lang, 153 Ill. 175.....	499
Davis' Heirs v. Taul, 6 Dana, 51.....	55
Day, <i>In re</i> , 181 Ill. 73.....	252
Day v. Bullen, 226 Ill. 72.....	180
Deadman v. Yantis, 230 Ill. 243.....	367
Decker v. Stansberry, 249 Ill. 487.....	26
Deemer v. Kessinger, 206 Ill. 57.....	394
Defrees v. Brydon, 275 Ill. 530.....	54
Deneen v. Unverzagt, 225 Ill. 378.....	123
Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504.....	429
Devine v. National Safe Deposit Co. 240 Ill. 369.....	213
Dibble v. Winter, 247 Ill. 243.....	83
Dick v. Ricker, 222 Ill. 413.....	395, 393, 391
Dickinson v. Industrial Board, 280 Ill. 342.....	612
Dietrich v. Dietrich, 1 Pen. & Watts, 306.....	194
Dietzen Co. v. Industrial Board, 279 Ill. 11.....	214
Dime Savings and Trust Co. v. Watson, 283 Ill. 276.....	638
Dixon, City of, v. Scott, 181 Ill. 116.....	515
Dobbins v. First Nat. Bank, 112 Ill. 553.....	109
Dobschuetz v. Holliday, 82 Ill. 371.....	642
Doe v. Kett, 4 Durn. & East, 601.....	55
Dolbeer's Estate, <i>In re</i> , 149 Cal. 227.....	433
Donk Bros. Coal Co. v. Peton, 192 Ill. 41.....	354
Donner v. Highway Comrs. 278 Ill. 189.....	448
Dorsey v. Dodson, 203 Ill. 32.....	58, 57
Dorsey v. St. Louis, Alton and Terre Haute R. R. Co. 58 Ill. 65.	34
Dougherty v. Pacific Mutual Life Ins. Co. 154 Pa. St. 385...	433
Dowie v. Driscoll, 203 Ill. 480.....	193
Dowie v. Priddle, 216 Ill. 553.....	413
Dragovich v. Iroquois Iron Co. 269 Ill. 478.....	520
DuBois v. People, 200 Ill. 157.....	124
Dugger v. Oglesby, 99 Ill. 405.....	156
Dunn v. Crichfield, 214 Ill. 292.....	286

	PAGE.
Dunn v. Keegin, 3 Scam. 292.....	500, 499, 498
Dunne v. Rock Island County, 273 Ill. 53.....	360
Dunne v. Rock Island County, 283 Ill. 628.....	361

E

East St. Louis, City of, v. Davis, 233 Ill. 553.....	629
Eddy v. Morgan, 216 Ill. 437.....	111, 109
Eells v. People, 4 Scam. 498.....	445
Eldorado Coal Co. v. Swan, 227 Ill. 586.....	356, 354
Emerick v. Hileman, 177 Ill. 368.....	180
Ensign v. Pennsylvania, 227 U. S. 592.....	315
Eyer v. Williamson, 256 Ill. 540.....	57

F

Farmer v. People, 77 Ill. 322.....	445
Farrington v. Kimball, 126 Mass. 313.....	155
Featherstone v. People, 194 Ill. 325.....	287, 271
Fehr Construction Co. v. Postl System, 189 Ill. App. 519.....	636
Fellows-Kimbrough v. Chicago City Ry. Co. 272 Ill. 71.....	323
Fifer v. Allen, 228 Ill. 507.....	467, 466
First Nat. Bank of Joliet v. Adam, 138 Ill. 483.....	153
First Nat. Bank v. Lake Erie and West. R. R. Co. 174 Ill. 36..	205
Fischer v. Eslaman, 68 Ill. 78.....	104
Fisher v. McIntosh, 277 Ill. 432.....	13
Fitzgerald v. Fitzgerald, 100 Ill. 385.....	26
Flanders v. Whittaker, 13 Ill. 707.....	499, 498
Foster v. Shepherd, 258 Ill. 164.....	428
Fowler v. Black, 136 Ill. 363.....	394, 393
Franklin v. Hastings, 253 Ill. 46.....	232
Franklin Square House v. Boston, 188 Mass. 409.....	233
Freeland v. People, 16 Ill. 380.....	122
Freeman v. State, 108 Miss. 818.....	324
French v. Calkins, 252 Ill. 243.....	232
Friedman Manf. Co. v. Industrial Com. 284 Ill. 554.....	140
Fruit v. Industrial Board, 284 Ill. 154.....	169, 167, 44
Fuller, <i>In re</i> , 225 Pa. St. 626.....	58

G

Gainey v. People, 97 Ill. 270.....	47
Galveston, H. and S. A. Ry. Co. v. Parrish, 43 S. W. Rep. 536.	97
Garvin, Bell & Co. v. Stewart's Heirs, 59 Ill. 229.....	179
Geiger v. Geiger, 247 Ill. 629.....	190
Gerling v. Lain, 269 Ill. 337.....	34
Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43.....	433

	PAGE.
Gibbs v. Minn. Fire Department Relief Ass'n, 125 Minn. 174..	112
Giles v. Anslow, 128 Ill. 187.....	466, 465
Gill v. Hoblit, 23 Ill. 473.....	458
Gindrat v. People, 138 Ill. 103.....	315
Goddard v. Enzler, 222 Ill. 462.....	483
Gorman v. Mullins, 172 Ill. 349.....	574
Graber v. Duluth, S. S. & A. Ry. Co. 159 Wis. 414.....	610
Grace v. Seibert, 235 Ill. 190.....	149
Graham v. People, 115 Ill. 566.....	48
Grand Lodge v. Board of Review, 281 Ill. 480.....	232
Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408.....	428
Granite State Provident Ass'n v. Lloyd, 145 Ill. 620.....	296
Grantwood Lumber and Supply Co. v. Abbott, 80 N. J. L. 564..	641
Graves, <i>In re</i> Estate of, 242 Ill. 212.....	82
Graybeal v. Gardner, 146 Ill. 337.....	198
Greenwood v. Gmelich, 175 Ill. 526.....	255, 249
Greenwood v. Greenwood, 178 Ill. 387.....	57
Grosvenor v. Magill & Latham, 37 Ill. 239.....	287
Gulick v. Hamilton, 287 Ill. 367.....	362

H

Haas Electric Co. v. Amusement Co. 236 Ill. 452.....	643, 642, 641
Hagan v. Varney, 147 Ill. 281.....	392
Hahnemann Hospital v. Industrial Board, 282 Ill. 316....	535, 44
Hall v. Davis, 44 Ill. 494.....	458
Hall v. Marten, 46 N. H. 337.....	157
Haller Sign Works v. Physical Culture School, 249 Ill. 436...	238
Hamilton v. Pittsburg, M. and L. E. R. R. Co. 190 Pa. St. 51..	316
Hamlin v. United States Express Co. 107 Ill. 443.....	466
Hammond v. Shepard, 186 Ill. 235.....	553
Hansen v. Brann & Stewart Co. 90 N. J. L. 444.....	140
Harris v. Fergus, 207 Ill. 534.....	466
Harvey v. Ballard, 252 Ill. 57.....	394
Hathaway v. Merchants' Loan and Trust Co. 218 Ill. 580....	109
Hawthorn v. People, 109 Ill. 302.....	445
Hay v. Bennett, 153 Ill. 271.....	195
Hayes v. Boylan, 141 Ill. 400.....	25
Hayward v. Loper, 147 Ill. 41.....	57
Heitz, <i>In re</i> , 218 N. Y. 148.....	130
Hempstead v. Hempstead, 285 Ill. 448.....	468
Henderson v. Blackburn, 104 Ill. 227.....	466
Heppes Co. v. City of Chicago, 260 Ill. 506.....	579, 578
Heuser v. Harris, 42 Ill. 425.....	232
Higgins v. Higgins, 219 Ill. 146.....	566
Hirschman v. People, 101 Ill. 568.....	380

	PAGE.
Hite v. Cin., Indianapolis and West. R. R. Co. 284 Ill. 297....	588
Hobart v. Hobart, 154 Ill. 610.....	54
Hochspeier v. Industrial Board, 278 Ill. 523.....	169
Hoener v. Koch, 84 Ill. 408.....	323
Holroyd v. Marshall, 10 H. L. Cas. 191.....	152
Home Savings Bank v. Bierstadt, 168 Ill. 618.....	368
Hopkins v. Medley, 97 Ill. 402.....	452
Houck v. Yates, 82 Ill. 179.....	550
Huffman v. Young, 170 Ill. 290.....	465
Hughes v. Streeter, 24 Ill. 648.....	22
Hughes v. Traeger, 264 Ill. 612.....	110
Hutson v. Wood, 263 Ill. 376.....	461

I

Illinois Central R. R. Co. v. O'Connor, 154 Ill. 550.....	22, 18
Illinois Central R. R. Co. v. Reardon, 157 Ill. 372.....	483
Illinois Central R. R. Co. v. Siler, 229 Ill. 390.....	515
Illinois Malleable Iron Co. v. Lincoln Park Comrs. 263 Ill. 446.	340
Illinois Western Electric Co. v. Town of Cicero, 282 Ill. 468...	578
International Harvester Co. v. Industrial Board, 282 Ill. 489..	210
Irving v. Irving, 47 N. Y. Supp. 1052.....	392
Isham v. Miller, 44 N. J. Eq. 61.....	181

J

Jackson v. Phillips, 14 Allen, 556.....	232
Jacobs v. Ditz, 260 Ill. 98.....	468, 467
Jacobs v. People, 218 Ill. 500.....	444
Jennings v. Dunphy, 174 Ill. 86.....	567
Johnson v. Askey, 190 Ill. 58.....	467
Johnson v. Buck, 220 Ill. 226.....	54
Johnson v. Johnson, 98 Ill. 564.....	468
Johnson v. United States, 228 U. S. 457.....	315
Johnson Co. v. Beloosky, 263 Ill. 363.....	203
Jones v. Jones, 124 Ill. 254.....	465
Jones v. Townsend's Admx. 58 Am. Rcp. 676.....	417

K

Kadish v. Young, 108 Ill. 170.....	475
Kankakee Coal Co. v. Crane Bros. Manf. Co. 128 Ill. 627....	594
Kansas City R. R. Co. v. Stiles, 242 U. S. 111.....	303
Keller v. People, 204 Ill. 604.....	385
Kerfoot v. City of Chicago, 195 Ill. 229.....	629
Kerr v. Ayr Steam Shipping Co. (1915) App. Cas. 217.....	215
Kesner v. Miesch, 204 Ill. 320.....	531

	PAGE.
Kettles v. People, 221 Ill. 221.....	239
Kirby v. Wabash, St. Louis and Pacific Ry. Co. 109 Ill. 412..	33, 28
Kinsella v. Stephenson, 265 Ill. 369.....	552
Knight v. Pottgieser, 176 Ill. 368.....	63
Knights Templars Indemnity Co. v. Crayton, 209 Ill. 550..	432, 428
Kochersperger v. Drake, 167 Ill. 122.....	82
Kribs v. People, 82 Ill. 425.....	323
Krieger v. Aurora, Elgin and Chicago R. R. Co. 242 Ill. 544...	485
Krogh v. Modern Brotherhood, 153 Wis. 397.....	433

L

Lambert v. Alcorn, 144 Ill. 313.....	362
Lamson v. Boyden, 160 Ill. 613.....	315
Lander v. Lander, 217 Ill. 289.....	467, 466
Lansing v. Dempster, 255 Ill. 161.....	638
Lehndorf v. Cope, 122 Ill. 317.....	28
Leighton v. Chicago Traction Co. 235 Ill. 283.....	383
Levy v. Chicago Nat. Bank, 158 Ill. 88.....	287
Libby, McNeill & Libby v. Cook, 222 Ill. 206.....	478
Lickmon v. Harding, 65 Ill. 505.....	26
Littler v. City of Lincoln, 106 Ill. 353.....	579, 578
Lloyd v. Rush, 273 Ill. 489.....	191, 190
Loeber v. Leininger, 175 Ill. 484.....	179
Locwenthal v. McCormick, 101 Ill. 143.....	314
Long v. People, 135 Ill. 435.....	119
Lord v. Comstock, 240 Ill. 492.....	393
Louisville and Nashville R. R. Co. v. Mottley, 219 U. S. 467...	589
Lowe v. Foulke, 103 Ill. 58.....	101
Lurton v. Rodgers, 139 Ill. 554.....	566

M

Macierz Polska v. Czarnecki, 272 Ill. 34.....	575
Mackin v. Haven, 187 Ill. 480.....	156
Mackinnon v. Miller, 2 B. W. C. C. 64.....	214
Maguire v. Moore, 108 Mo. 267.....	61
Maguire v. People, 219 Ill. 16.....	445
Maine v. Grand Trunk Ry. Co. 142 U. S. 217.....	303, 302
Maiss v. Metropolitan Amusement Ass'n, 241 Ill. 177.....	401
Manning v. Manning, 229 Mass. 527.....	62, 61
Manning v. Mercantile Security Co. 242 Ill. 584.....	315
Manrose v. Parker, 90 Ill. 581.....	383
Mapes v. People, 69 Ill. 523.....	445
Marsh v. People, 226 Ill. 464.....	260
Marshall v. City of Pekin, 276 Ill. 187.....	44

	PAGE.
Marshall v. Owners of Ship Wild Rose, 3 B. W. C. C. 514. 216, 214	
Martens v. Brady, 264 Ill. 178.....	340, 339
Martin v. Martin, 170 Ill. 18.....	176
Martin v. Martin, 273 Ill. 595.....	57, 56
Mason v. Bloomington Library Ass'n, 237 Ill. 442.....	573
Masterson v. Cheek, 23 Ill. 72.....	25
Matthiessen & Hegeler Zinc Co. v. Indus. Board, 284 Ill. 378..	90
McCulloch v. State of Maryland, 4 Wheat. 429.....	160
McFall v. Kirkpatrick, 236 Ill. 281.....	441, 440, 394
McMillan v. McDill, 110 Ill. 47.....	193
McMullen & Co. v. Croft, 96 Wash. 275.....	599
McNicol, <i>In re</i> , 215 Mass. 497.....	128
Meadowcroft v. People, 163 Ill. 56.....	313
Memphis & C. R. R. Co. v. Womack, 84 Ala. 149.....	433
Mertens v. Southern Coal Co. 235 Ill. 540.....	354
Messmer v. Industrial Board, 282 Ill. 562.....	350
Mette v. Feltgen, 148 Ill. 357.....	195
Metzradt v. Modern Brotherhood, 112 Iowa, 522.....	432
Meyer v. Cole, 12 Johns. 349.....	151
Milk v. Moore, 39 Ill. 584.....	86
Miller v. Mowers, 227 Ill. 392.....	395
Miller v. Rowan, 251 Ill. 344.....	449
Minneapolis and St. Louis R. R. Co. v. Winter, 242 U. S. 353..	131
Mittelstadt v. Modern Woodmen, 143 Iowa, 186.....	432
Mooney v. People, 111 Ill. 388.....	385
Moore v. Neil, 39 Ill. 256.....	458
Morris & Co. v. Industrial Board, 284 Ill. 67.....	430, 429
Morse v. Wheeler, 86 Mass. 570.....	69
Morton v. People, 47 Ill. 468.....	124
Mosser v. Flake, 258 Ill. 233.....	54
Moustgaard v. Industrial Com. 287 Ill. 156.....	346
Mozeiko v. Lehigh Valley Transportation Co. 235 Ill. 324....	474
Munn v. People, 69 Ill. 80.....	446
Mueller Construction Co. v. Industrial Board, 283 Ill. 148..	345, 129

N

Nagel v. People, 229 Ill. 598.....	122
Newell v. Montgomery, 129 Ill. 58.....	461
Newman v. People, 223 Ill. 324.....	385
New York Central R. R. Co. v. Porter, 39 Sup. Ct. 188.....	611
New York Central R. R. Co. v. Winfield, 244 U. S. 147.....	611
Noble v. Tipton, 219 Ill. 182.....	56
Noel v. People, 187 Ill. 587.....	238
Nokomis, City of, v. Zepp, 246 Ill. 159.....	630

	PAGE.
Northwestern Mutual Co. v. Wisconsin, 247 U. S. 132.....	303
Novitsky v. Knickerbocker Ice Co. 276 Ill. 102.....,	429
Nowlan v. Nowlan, 272 Ill. 526.....	394

O

Oak Park, Village of, v. Eldred, 265 Ill. 605.....	629
O'Brien v. People, 216 Ill. 354.....	450
O'Connor v. High School Board, 278 Ill. 618; 285 id. 120....	243
Odin Coal Co. v. Denman, 185 Ill. 413.....	354
Off & Co. v. Morehead, 235 Ill. 40.....	202
Ohio Vault Co. v. Industrial Board, 277 Ill. 96.. 520, 429, 213, 129	
Orendorff v. Stanberry, 20 Ill. 89.....	458, 457
Orthwein v. Thomas, 127 Ill. 554.....	461
Owings v. Estes, 256 Ill. 553.....	643
Owners of Lands v. People, 113 Ill. 296.....	341
Owners of Ship Swansea Vale v. Rice, 4 B. W. C. C. 298. 215, 213	

P

Padfield v. People, 146 Ill. 660.....	384, 381, 380
Pardridge v. Cutler, 168 Ill. 504.....	485
Parker v. Orr, 158 Ill. 609.....	279
Parker-Washington Co. v. Industrial Board, 274 Ill. 498.....	136
Parkinson v. People, 135 Ill. 401.....	277
Parsons v. Millar, 189 Ill. 107.....	468
Paulsen v. Manske, 126 Ill. 72.....	594
Peabody Coal Co. v. Industrial Com. 287 Ill. 407.....	404
Pearson v. McBean, 231 Ill. 536.....	156
Pearson v. Stephen, 2 D. & Cl. 328.....	62
Pease v. Davis, 225 Ill. 408.....	394
Pecoy v. City of Chicago, 265 Ill. 78.....	111
Pedersen v. Delaware, Lack. and West. R. R. Co. 229 U. S. 146.	611
Peebles v. O'Gara Coal Co. 239 Ill. 370.....	355
Pekin Cooperage Co. v. Industrial Com. 285 Ill. 31.....	519
Pennie v. Reis, 132 U. S. 464.....	112, 111, 110
People v. Abbott, 274 Ill. 380.....	110
People v. Apfelbaum, 251 Ill. 18.....	341
People v. Bissett, 246 Ill. 516.....	493
People v. Bruennemer, 168 Ill. 482.....	252
People v. Cairo, Vincennes and Chicago Ry. Co. 237 Ill. 312..	487
People v. Capello, 282 Ill. 542.....	188
People v. Chicago and Eastern Illinois R. R. Co. 270 Ill. 594..	248
People v. Chicago and Illinois Midland Ry. Co. 256 Ill. 488.. 79,	15
People v. Chicago and Northwestern Ry. Co. 286 Ill. 384.....	72
People v. Clark, 283 Ill. 221.....	110
People v. Cleveland, Cin., Chi. and St. L. Ry. Co. 266 Ill. 98..	279

PAGE.

People v. Cleveland, Cin., Chi. and St. L. Ry. Co. 286 Ill. 414..	72
People v. Culver, 281 Ill. 401.....	629
People v. Deluce, 237 Ill. 541.....	274
People v. Donahoe, 279 Ill. 411.....	286
People v. Duzan, 272 Ill. 478.....	381
People v. Election Comrs. 221 Ill. 9.....	248
People v. Ellerding, 254 Ill. 579.....	445
People v. Fernow, 286 Ill. 627.....	446
People v. Fifer, 280 Ill. 506.....	15
People v. Flynn, 265 Ill. 414.....	401
People v. Freeman, 244 Ill. 590.....	273
People v. Fuller, 238 Ill. 116.....	413
People v. Gordon, 194 Ill. 560.....	238
People v. Grosenheider, 266 Ill. 324.....	388, 48
People v. Gunn, 281 Ill. 244.....	421
People v. Harper, 244 Ill. 121.....	449
People v. Harrison, 191 Ill. 257.....	400
People v. Harrison, 261 Ill. 517.....	285
People v. Hartenbower, 283 Ill. 591.....	315
People v. Hartsig, 249 Ill. 348.....	287
People v. Hatinger, 174 Mich. 333.....	446
People v. Henning Co. 260 Ill. 554.....	445
People v. Hibernian Banking Ass'n, 245 Ill. 522.....	176
People v. Holten, 259 Ill. 219.....	176
People v. Illinois Central R. R. Co. 237 Ill. 324.....	487
People v. Kankakee River Improvement Co. 103 Ill. 491.....	547
People v. Kipley, 171 Ill. 44.....	123
People v. Klee, 282 Ill. 440.....	489, 488, 487
People v. Leonard, 279 Ill. 159.....	449
People v. Lutzow, 240 Ill. 612.....	274
People v. Madison, 280 Ill. 96.....	421, 15
People v. Martellaro, 281 Ill. 300.....	385
People v. Mathews, 282 Ill. 85.....	421, 15
People v. McBride, 234 Ill. 146.....	335
People v. McWeeney, 259 Ill. 161.....	197
People v. New York Central R. R. Co. 282 Ill. 11; id. 458.....	15
People v. New York Central R. R. Co. 283 Ill. 334.....	421, 420
People v. Nylin, 236 Ill. 19.....	445
People v. Owen, 286 Ill. 638.....	421, 420
People v. Parker, 284 Ill. 272.....	286
People v. Pittsburg, Cin., Chi. and St. L. R. R. Co. 284 Ill. 87..	15
People v. Poindexter, 243 Ill. 68.....	124
People v. Rardin, 255 Ill. 9.....	277
People v. Roth, 249 Ill. 532.....	341
People v. Sangamon and Drummer Drain. Dist. 253 Ill. 332....	448

	PAGE.
People v. Scattura, 238 Ill. 313.....	275, 274
People v. Seelye, 146 Ill. 189.....	450
People v. Seymour, 272 Ill. 295.....	286
People v. Snedeker, 282 Ill. 425.....	279
People v. Solomon, 265 Ill. 28.....	525
People v. Spoor, 235 Ill. 230.....	445
People v. Stitt, 280 Ill. 553.....	421, 15
People v. Stokes, 281 Ill. 159.....	445
People v. Stowers, 254 Ill. 588.....	380
People v. Talmadge, 194 Ill. 67.....	450, 449
People v. Taylor, 279 Ill. 481.....	444
People v. Tielke, 259 Ill. 88.....	575
People v. Turner, 265 Ill. 594.....	381
People v. Vogt, 262 Ill. 170.....	488
People v. Weis, 275 Ill. 581.....	421, 420, 14
People v. Weston, 236 Ill. 104.....	575
People v. Wilson, 249 Ill. 195.....	238
People v. Woodruff, 286 Ill. 472.....	15
People v. Zimmer, 252 Ill. 9.....	449
People v. Zurek, 277 Ill. 621.....	270, 47
Peoria, City of, v. Darst, 101 Ill. 609.....	465
Peoria Cordage Co. v. Industrial Board, 284 Ill. 90.....	431, 430
Peoria Gas and Electric Co. v. Dunbar, 234 Ill. 502.....	551, 550
Peoria Ry. Ter. Co. v. Indus. Board, 279 Ill. 352.219, 214, 213, 90	
Perry v. Bowman, 151 Ill. 25.....	467
Perry County v. Jefferson County, 94 Ill. 214.....	334
Peterson & Co. v. Industrial Board, 281 Ill. 326.....	210
Phelps v. Nazworthy, 226 Ill. 254.....	553
Piazzi v. Kerens-Donnewald Coal Co. 262 Ill. 30.....	357
Pilstrand v. Swedish M. E. Church, 275 Ill. 46.....	198
Pittsburg, Cin. and St. L. Ry. Co. v. McGrath, 115 Ill. 172....	432
Plass v. Central New England Ry. Co. 221 N. Y. 472.....	609
Polar Ice and Fuel Co. v. Mulray, (Ind.) 119 N. E. Rep. 149..	130
Powell v. Koehler, 52 Ohio St. 103.....	84
Pullman Palace Car Co. v. Laack, 143 Ill. 242.....	515
Purinton v. Northern Illinois R. R. Co. 46 Ill. 297.....	20
Purvis v. Shuman, 273 Ill. 286.....	155, 154
Pyle v. Pyle, 158 Ill. 289.....	428

R

Rafferty v. People, 69 Ill. 111; 72 id. 37.....	493, 492
Randolph v. Hinck, 277 Ill. 11.....	100
Rasch v. Rasch, 278 Ill. 261.....	367
Rearick v. Wilcox, 81 Ill. 77.....	417

	PAGE.
Reece v. Allen, 5 Gilm. 236.....	104
Reed v. Village of Chatsworth, 201 Ill. 480.....	176
Reed v. Welborn, 253 Ill. 338.....	469
Rich v. City of Chicago, 59 Ill. 286.....	433
Richardson v. Nelson, 221 Ill. 254.....	484
Rider v. People, 110 Ill. 10.....	380
Ridgway, Village of, v. Gallatin County, 181 Ill. 521.....	603
Robb v. Bostwick, 4 Scam. 115.....	499, 498
Roe v. Rowston, 2 Taunt. 441.....	84
Roe v. Taylor, 45 Ill. 485.....	198
Roebbling's Sons' Co. v. Lock Stitch Fence Co. 130 Ill. 660....	475
Rose v. Hale, 185 Ill. 378.....	465
Roszek v. Bauerle & Stark Co. 282 Ill. 557.....	350
Ruhstrat v. People, 185 Ill. 133.....	238
Ruppell v. New York Central R. R. Co. 157 N. Y. Supp. 1095..	613
Russell v. High School Board, 212 Ill. 327.....	77

S

Samson v. Samson, 64 Cal. 327.....	84
Sanford v. Kane, 133 Ill. 199.....	27
Sanitary District v. Industrial Board, 282 Ill. 182.....	44
Savoy Hotel Co. v. Industrial Board, 279 Ill. 329.....	210
Sayles v. Christie, 187 Ill. 420.....	68, 67
Scates v. King, 110 Ill. 456.....	260
Schaefer v. Schaefer, 141 Ill. 337.....	393, 392
Schmidt v. Brown, 226 Ill. 590.....	546
Schoonmaker v. Doolittle, 118 Ill. 605.....	554
Selden v. Illinois Trust and Savings Bank, 239 Ill. 67.....	82
Sexton v. Cook County, 114 Ill. 174.....	260
Seymour v. Union Stock Yards Co. 224 Ill. 579.....	512
Shackleford v. Bennett, 237 Ill. 523.....	309
Shannon v. Swanson, 208 Ill. 52.....	270
Shaw v. Allen, 184 Ill. 77.....	461
Sinnet v. Bowman, 151 Ill. 146.....	82
Smith v. Henline, 174 Ill. 184.....	191
Smith v. Preston, 170 Ill. 179.....	149
Smith v. Proctor, 139 N. C. 314.....	22
Smith & Co. v. Williams, 178 Ill. 420.....	150
Smith-Lohr Co. v. Indus. Com. 286 Ill. 34. 536, 267, 139, 138, 137	
Snell v. Weldon, 239 Ill. 279.....	191
Snydacker v. Swan Land and Cattle Co. 154 Ill. 220.....	157, 156
Sorg v. Crandall, 233 Ill. 79.....	597, 594
Southern Pacific Co. v. Indus. Accident Com. 174 Cal. 8. 609, 608	
Spangler v. Newman, 239 Ill. 616.....	468
Spatz v. Paulus, 285 Ill. 82.....	440, 437, 436

	PAGE.
Spaulding v. White, 173 Ill. 127.....	82
Speight v. People, 87 Ill. 595.....	15
Spencer v. Spencer, 31 Mont. 631.....	84
Spengler v. Kuhn, 212 Ill. 186.....	391
Spitzer v. Schlatt, 249 Ill. 416.....	101
Staeger v. Commonwealth, 103 Pa. 469.....	314
Staley v. Illinois Central R. R. Co. 268 Ill. 356.....	612
Stanton v. Chicago City Ry. Co. 283 Ill. 256.....	474
Starr v. United States, 153 U. S. 614.....	493
Starr v. Willoughby, 218 Ill. 485.....	104
State v. Cecil County, 54 Md. 426.....	433
State v. Crummey, 17 Minn. 72.....	314
State v. Fire Ass'n, 23 N. J. L. 195.....	304
State v. Myers, 54 Kan. 206.....	324
State v. Slagle, 82 N. C. 653.....	314
State v. Smith, 62 Minn. 540.....	314
State v. Sparks, 78 Ind. 166.....	314
State v. Stevens, 16 S. Dak. 309.....	324
State v. Strait, 94 Minn. 384.....	315
State v. Trustees, 121 Wis. 44.....	110
State Pub. Util. Com. v. T., St. L. & W. R. R. Co. 286 Ill. 582..	505
Stead v. Curtis, 205 Fed. Rep. 439.....	84
Steere v. Hoagland, 39 Ill. 264.....	179
Steffy v. People, 130 Ill. 98.....	274
Stevens v. Minn. Fire Department Relief Ass'n, 124 Minn. 381..	112
Stevens v. Pratt, 101 Ill. 206.....	296
Stisser v. Stisser, 235 Ill. 207.....	395, 394
Stollery v. Cicero Street Ry. Co. 243 Ill. 290.....	429
Stone v. Clarke's Admrs. 40 Ill. 411.....	156
Storrs v. St. Luke's Hospital, 180 Ill. 368.....	82
Stovall v. Carmichael, 52 Tex. 383.....	84
Suburban Ice Co. v. Industrial Board, 274 Ill. 630.....	346
Sullivan v. Seattle Electric Co. 51 Wash. 71.....	433
Supreme Lodge Knights of Honor v. Fletcher, 78 Miss. 377...	432
Sutton v. People, 145 Ill. 279.....	380
Sweeney v. Baker, 31 Am. Rep. 757.....	417
Swiggart v. Harber, 4 Scam. 364.....	450

T

Tadman v. D'Epineuil, 20 L. R. Ch. Div. 758.....	152
Tallman v. Metropolitan Ry. Co. 121 N. Y. 119.....	316
Tarr v. Western Loan and Savings Co. 15 Idaho, 741.....	298
Taylor v. Tribune Publishing Co. 67 Fla. 361.....	417
Terhune v. Porter, 212 Ill. 595.....	553
Terry v. Hamilton Primary School, 72 Ill. 476.....	309

	PAGE.
Teter v. Spooner, 279 Ill. 39.....	97
Texas and Pacific Ry. Co. v. Rigsby, 241 U. S. 33.....	609
Thede Bros. v. Industrial Com. 285 Ill. 483.....	535
Thomas v. Whitney, 186 Ill. 225.....	97
Thompson v. Adams, 205 Ill. 552.....	393, 392
Tomlinson v. Sovereign Camp, 160 Iowa, 472.....	432
Tradesmen's Ass'n v. Thompson, 32 N. J. Eq. 133.....	368
Trask v. People, 151 Ill. 523.....	315
Trim School District v. Kelly, 7 B. W. C. C. 274.....	130
Trustees of Schools v. People, 161 Ill. 146.....	252
Turney v. Shriver, 269 Ill. 164.....	362
Tyrrell v. Ward, 102 Ill. 29.....	369, 368

U

Union Pacific Ry. Co. v. Public Util. Com. 248 U. S. 67.....	301
Union Railway and Transit Co. v. Kallaher, 114 Ill. 325.....	383
Union Trust Co. v. Shoemaker, 258 Ill. 564.....	156
United States Brewing Co. v. Stoltenberg, 211 Ill. 531.....	485
United States Express Co. v. Minnesota, 223 U. S. 335.....	302
United States Glue Co. v. Oak Creek, 247 U. S. 341.....	303
United States Life Ins. Co. v. Vocke, 129 Ill. 557.....	428
United States Mortgage Co. v. Gross, 93 Ill. 483.....	33

V

Vaughan's Seed Store v. Simonini, 275 Ill. 477.....	169, 167, 44
Victor Chemical Works v. Industrial Board, 274 Ill. 11.....	521
VonËtte v. Globe Co. (Mass.) L. R. A. 1916D, 641..	220, 216, 213

W

Wabash Ry. Co. v. Industrial Com. 286 Ill. 194.....	136
Waggoner v. Saether, 267 Ill. 32.....	541
Walden v. Bankers' Life Ass'n, 89 Neb. 546.....	433
Walker v. Pritchard, 121 Ill. 221.....	488, 465
Walter Cabinet Co. v. Russell, 250 Ill. 416.....	500, 499, 498
Walton v. Follansbee, 131 Ill. 147.....	104
Wangler Boiler Co. v. Industrial Com. 287 Ill. 118.....	402, 139
Wasey v. Traveler's Ins. Co. 126 Mich. 119.....	433
Waters v. People, 172 Ill. 367.....	385
Waukegan, City of, v. Lyon, 253 Ill. 452.....	629
Webbe v. Webbe, 234 Ill. 442.....	394
Weeks v. Chicago and Northwestern Ry. Co. 198 Ill. 551.....	474
Welch v. Caldwell, 226 Ill. 488.....	232
Wells v. Wells, 144 Mo. 198.....	84
Wertz v. Sprecher, 82 Neb. 834.....	416

	PAGE.
Weston v. Teufel, 213 Ill. 291.....	97
Wheeler & Wilson Manf. Co. v. Barrett, 172 Ill. 610.....	205
Whitcomb v. Rodman, 156 Ill. 116.....	465
White v. Cannon, 125 Ill. 412.....	369
Wickes v. Walden, 228 Ill. 56.....	382, 191
Wiggins Ferry Co. v. Ohio and Mississippi Ry. Co. 94 Ill. 83....	154
Wilkinson v. Ætna Life Ins. Co. 240 Ill. 205.....	213
Williams v. Bishop, 15 Ill. 553.....	86
Williams v. Williams, 265 Ill. 64.....	459
Wilson v. Board of Trustees, 133 Ill. 443.....	79
Wilson v. County of Marion, 205 Ill. 580.....	176
Winter v. Dibble, 251 Ill. 200.....	394, 53
Wisconsin and Michigan Ry. Co. v. Powers, 191 U. S. 379....	302
Wixon v. Watson, 214 Ill. 158.....	57
Woodman v. Illinois Trust and Savings Bank, 211 Ill. 578....	478
Wright v. Simpson, 200 Ill. 56.....	461

Y

Yess v. Yess, 255 Ill. 414.....	191
Young v. Harkleroad, 166 Ill. 318.....	467
Young v. Morgan, 89 Ill. 199.....	369

Z

Zeigler v. Illinois Trust and Savings Bank, 245 Ill. 180.....	473
---	-----

57
 12/11/19

